Office Supreme Court, U.S.
FILED

No. [redacted]

[redacted],
Appellant,

v.

[redacted],
Defendant,

and

[redacted],
Appellee.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Statutes Involved	5
Statement of the Case	7
A. The Bus Industry and the Place of the Challenged Acquisitions Therein	7
B. Appellant Interstate Endeavors to Become a Competitive Factor in the Bus Industry By Acquiring Queen	9
C. To Achieve the Duopoly Transcon Acquires the Bus System which Plaintiff Had Sought To Acquire	11
D. Transcon Secretly Acquires From Queen Stockholders Depositary Receipts Representing the Queen Stock, Thus Further Consummating the Acquisition Prior to the Required Approval By The Interstate Commerce Commission	15
E. Simultaneously, Transcon Agrees Under Similar Contracts to Acquire the Principal Remaining Independent Intercity Bus Lines in the East	16
F. Transcon's Application For Authorization Of Its Acquisitions By The Interstate Commerce Commission and Appellant's Intervention	17
G. Transcon Adduced No Evidence Before The Commission To Show Any Public Or Private Necessity For Its Acquisition	18
H. Appellant's Evidence As to the Desirability Of Preserving An Independent Third Competitive Force Is Rejected	21

PAGE

I. The Examiner's And The Commission's Decisions Lack Appropriate Findings On The Antitrust Law Issues 23

J. The Corrupt Prosecution Of Transcon's Application In The Interstate Commerce Commission By Means Of Testimony Known By Transcon And Its Counsel To Be False 26

K. Appellant's Unsuccessful Efforts To Bring Before The Commission The Issue Of False Testimony 31

L. Neither The Examiner Nor The Commission Made Findings Or Reached Conclusions With Respect to the Actual Facts Now Disclosed In Connection With The False Evidence Tendered By Transcon 36

The Questions Presented Are Substantial 38

I. The Commission's decision created a national duopoly in the bus industry to the exclusion of any third competitive force in violation of the Commission's duties, both substantive and procedural 39

A. The challenged acquisitions violate Section 7 of the Clayton Act 40

B. The Interstate Commerce Act does not empower The Interstate Commerce Commission to shelter the challenged acquisitions from the Clayton Act 44

C. Procedurally the Commission's decision cannot stand—the express failure to consider the general effect of the acquisitions upon the industry requires reversal 54

II. The Commission prior to granting Transcon's application under Section 5(2) of the Interstate Commerce Act, should have but did not consider preapproval violations of the Clayton Act by Transcon; the Commission improperly aborted its proceeding under Section 11 of the Clayton Act 57

PAGE

III. The Court below should have granted relief addressed to the false testimony and deliberate concealment of the facts with which Transcon supported its application in the Interstate Commerce Commission 64

IV. Appellant has standing to Sue 76

Conclusion 83

Appendix A—Opinion and Order of the District Court for the Southern District of New York A1

Appendix B—Report and Order of the Interstate Commerce Commission A40

Appendix C—Report and recommended Order of the Hearing Examiner A77

Appendix D—Text of statutes involved A134

Appendix E—List of Commission approved acquisitions by Transcon and Greyhound for the period 1936 through 1963 ..... A147

Appendix F—Selected portions of briefs and the record in the District Court containing admissions by appellees of depositary receipt purchases and false testimony before the Commission A164

Appendix G—False testimony of Moore, Love & Seheitel before the Commission A168

Appendix H—Admission by Transcon that the subject acquisitions created a duopoly in the Intercity Bus Industry A177

CITATIONS

Cases:

American Insurance Co. v. *Lucas,* 38 F. Supp. 926 (W. D. Mo. 1941), *aff'd,* 129 F. 2d 143 (8th Cir.), *cert. denied,* 317 U. S. 687 (1942) 74

Cases:

PAGE

American Trucking Assns. v. *United States*, 364 U. S. 1, (1960) 78

Baltimore & O. R. R. v. *United States*, 386 U. S. 372 (1967) 54, 55

Brown Shoe Co. v. *United States*, 370 U. S. 294 (1962) 41, 49

Brown Express-Purchase-Jones Motor Freight Lines, Inc., 55 M. C. C. 127 (1948) 38, 69

Carnation Co. v. *Pacific Westbound Conference*, 383 U. S. 213 (1966) 63

Carter v. *Twentieth Century-Fox Film Corporation*, 127 F. Supp. 675 (W. D. Mo. 1955) 82, 83

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967) 80

Central of Georgia Control, 307 I.C.C. 39 (1958) 75

Chandler v. *Atlas General Industries*, 215 F. Supp. 617 (D. Mass. 1963) 83

Chesapeake & Ohio Ry.-Purchase, 271 I.C.C. 5 (1948) 63

Chicago v. *Atchison, T. & S. F. R. R.*, 357 U. S. 77 (1958) 78

Consolidated Gas & Equipment Co. of America v. *Carver*, 257 F. 2d 111 (10th Cir. 1958) 74

Delaware Valley Marine Supply Co. v. *American Tobacco Co.*, 184 F. Supp. 440 (E. D. Pa. 1960), *aff'd* 297 F. 2d 199 (3rd Cir. 1961), *cert. denied*, 369 U. S. 839 (1962) 78

Denver R.G.W.R.R. v. *United States*, 387 U. S. 485 .. 61

F.C.C. v. *R.C.A. Communications, Inc*, 346 U. S. 86 (1953) 45

F.C.C. v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940) 78, 79

F.C.C. v. *WOKO, Inc.*, 329 U. S. 223 (1946) ...38, 71, 72, 76

F.D.I.C. v. *Alker*, 234 F. 2d 113 (3rd Cir. 1956) 74

Cases: PAGE

F.T.C. v. *Proctor & Gamble Co.*, 386 U. S. 568 (1967) 42

Fox Midwest Theatres v. *Means*, 221 F. 2d 173 (8th Cir. 1955) 82, 83

Gilbertville Trucking Company v. *United States*, 371 U. S. 115 (1962) 38, 61, 69, 75

Graham v. *Atchison, T. & S. F. Ry. Co.*, 176 F. 2d 819 (9th Cir. 1949) 83

Greybound Corporation-Control-Texas, New Mexico & Oklahoma Coaches, Inc., 101 M.C.C. 655 (1966) 7, 51

Hazel-Atlas Glass Co. v. *Hartford Empire Co.*, 322 U. S. 238 (1944) 64, 67, 68, 70, 71, 72

Helvering v. *Southwest Consolidated Corp.*, 315 U. S. 194, 198 (1942) 12

Houston v. *Trower*, 297 Fed. 558 (8th Cir. 1924) 82

I.C.C. v. *Hoboken Manufactures' R. R.*, 320 U. S. 368 (1943) 4

I.C.C. v. *Baltimore & O. R. R.*, 160 I.C.C. 785 (1930) 63

Immaculate Conception Church of Los Angeles v. *F.C.C.*, 320 F. 2d 795 (D. C. Cir.), *cert. denied*, 375 U. S. 904 (1963) 76

Kingsland v. *Darsey*, 338 U. S. 318 (1949) 75

Klapprott v. *United States*, 336 U. S. 942 (1949) 74

Kosztelnik v. *Bethlehem Iron Co.*, 91 Fed. 606 (E.D.N.Y. 1898) 83

Lombard Bros., Inc. v. *United States*, 226 F. Supp. 905 (D. Conn. 1964) 38, 69

Lorain Journal Co. v. *F.C.C.*, 351 F. 2d 824 (D. C. Cir. 1965), *cert. denied*, 383 U. S. 967 (1966) 76

Marcell-Purchase-Rowley, 50 M.C.C. 699 (1948) 69

Mayle v. *Griss*, 169 F. Supp. 58 (W. D. Pa. 1958) 82

McLean Trucking Co. v. *United States*, 321 U. S. 67 (1944) 21, 45, 46, 47, 48, 49, 52, 53

Cases:

PAGE

McNamara Motor Exp., Inc.-Purchase-Rainbow Exp., Inc., 55 M.C.C. 357 (1949) 69

Minneapolis & St. Louis Ry. v. *United States*, 361 U. S. 173 (1959) 45, 49, 63

Neeff v. *Emery Transportation Co.*, 284 F. 2d 432 (2nd Cir. 1960) 83

North Texas Producers Association v. *Young*, 308 F. 2d 235 (5th Cir. 1962), *cert. denied*, 372 U. S. 929 (1963) 78

Office of Communication v. *F.C.C.*, 359 F. 2d 994 (D. C. Cir. 1966) 78

Pacific Greyhound Lines-Control & Merger-Geronomo Lines, 56 M.C.C. 415 (1950) 59

Petition of Demetrios Devlas, 31 F.R.D. 130 (S.D.N.Y. 1962) 74

Powell v. *United States*, 300 U. S. 276 (1937) 74

Radio Corp. v. *Raytheon Co.*, 296 U. S. 459 (1935) .. 83

Raymond Bros. M. Transp., Inc.-Purchase-North American, 37 M.C.C. 431 (1941) 38, 69

Refiners Trans. & Term Corp.-Purchase-Petroleum, 39 M.C.C. 662 (1944) 69

Robinson v. *F.C.C.*, 334 F. 2d 534 (D. C. Cir.), *cert. denied*, 379 U. S. 843 (1964) 76

Seaboard Air Line R. R. v. *United States*, 382 U. S. 154 (1965) 48

Seaboard Air Line R. R.-Merger-Atlantic Coast Line, 321 I.C.C. 122 (1963) 49

South Carolina Council of Milk Producers, Inc. v. *Newton*, 360 F. 2d 414 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966) 78

St. Louis & O'Fallon Ry. v. *United States*, 279 U. S. 461 (1929) 4

System Tank Lines, Inc.-Purchase-Lang Transp. Corp. 59 M.C.C. 724 (1953) 69

Cases: PAGE

Texas & N. O. R. Co. v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151 (5th Cir. 1962), *cert. denied*, 371 U. S. 1952 (1963) 68-69

T. I. McCormack Trucking Co. v. *United States*, 251 F. Supp. 526 (D. N. J. 1966) 74

The Chicago Junction Case, 264 U. S. 258 (1924) ... 78

Transcontinental-Control-Southern Stages and Atlantic Stages, MC-F-8738 decided June 28, 1968 and 8

Transcontinental-Control-Edward Motor Transit Co., MC-F-9860 effective July 19, 1968 8

Turnbow v. *Commissioner*, 368 U. S. 337 (1961) 12

United States v. *Aluminum Co. of America*, 377 U. S. 271 (1964) 41, 42

United States v. *Baltimore O. R. R.*, 333 U. S. 169 (1948) 3-4

United States v. *Continental Can Co.*, 378 U. S. 441 (1964) 41, 42

United States v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964) 78

United States v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964) 78

United States v. *Philadelphia National Bank*, 374 U. S. 321 (1963) 41, 42

United States v. *Polakoff*, 121 F. 2d 333 (2nd Cir. 1941), *cert. denied*, 314 U. S. 626 (1941) 70

United States v. *Von's Grocery Co.*, 384 U. S. 270 (1966) 42

Universal Oil Products Co. v. *Root Refining Co.*, 328 U. S. 575 (1946) 74

Utah Gas Pipelines Corp. v. *El Paso Natural Gas Co.*, 233 F. Supp. 955 (D. Utah 1964) 78

Wagner v. *National Life Ins. Co.*, 90 Fed. 395 (6th Cir. 1898) 83

Cases: PAGE

Watson Bros. Transp. Co.-Lease-Burnett & Feighner, 55 M.C.C. 277 (1949) 38, 69

Westmoreland Asbestos Co. v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S.D.N.Y. 1941), *aff'd*, 136 F. 2d 844 (1943) (per curiam) 83

W. R. Grace & Co. v. *CAB*, 154 F. 2d 271 (2d Cir. 1946) 80

Books & Articles

Bittker & Eustice, *Federal Income Taxation of Corporations and Shareholders* (2 ed. 1966) 12

Comment, *Standing of Television Viewers*, 66 Colum. L. Rev. 1511 (1966) 79

3 Davis, *Administrative Law Treatise* (1958) 79

Fulda, *Competition in the Regulated Industries—Transportation* (1961) 53, 63

Fulda, *Recent Transportation Mergers*, 48 Minn. L. Rev. 723 (1963) 56

Jaffe, *Judicial Control of Administrative Action* (1965) 52

Note, *Competitors' Standing to Challenge Administrative Action Under the APA*, 104 U. Pa. L. Rev. 843 (1956) 79

Senator Hart, *Antitrust Enforcement in 1968*, 37 Antitrust Law Journal 275 (1968) 52

Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 Iowa L. Rev. 807 (1966) 75

Wilcox, *Competition and Monopoly in American Industry* (T.N.E.C. Monograph No. 21, 1940) 50

Miscellaneous

Standard & Poor's Corp., *Over the Counter & Regional Exchange Stock Reports*, §33 at 5358 (Aug. 2, 1968) 21

PAGE

Miscellaneous

Rule 86 of the Commission's General Rules of Practice 37

Remarks of Senator Wheeler, 79 Cong. Rec. 5655 (1935) 46

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 53

Statutes

Administrative Procedure Act § 10(a), 5 U.S.C. § 10009(a) 78

Clayton Act § 7, 15 U.S.C. § 18 .....27, 36, 41, 57, 61, 62

Clayton Act § 11(a)(b), 15 U.S.C. § 21(a)(b) 57, 58-64

Internal Revenue Code of 1954, § 368(a)(1)(B) 12

Interstate Commerce Act of September 18, 1940, ch. 722, Title I, § 1, 54 Stat. 899 46

Interstate Commerce Act § 5(2), 49 U.S.C. § 5(2) 41, 44, 61, 62

Interstate Commerce Act § 5(4), 49 U.S.C.§ 5(4) ...61, 68

Interstate Commerce Act § 5(11), 49 U.S.C. § 5(11) .. 44

Interstate Commerce Act § 205(g), 49 U.S.C.§ 305(g) 77

Motor Carrier Act of August 9, 1935, ch. 498, § 202(a), 49 Stat. 543 45

18 U.S.C. § 1505 .....13, 69

18 U.S.C. § 1621 70

Form of Citations

Citations to the Record in this statement will appear in the following form: e.g. R. 69-32. The first number represents the number of a document or item as it appears in the Index to the Record on Appeal. The second number represents the page cited within the particular document. Thus the citation *supra* refers to page 32 of the decision of the court below which is Index number 69.

Where an item appearing on the Index as one document contains multiple documents or items it will be cited as follows: e.g. R. 41-82-N. This refers to page 11 of the Hearing Examiner's report contained in item number 82 of appellant's Appendix in the court below which has Index number 41.

The transcript of the hearings and exhibits before the ICC are included in Index number 53 which contains the ICC's entire file in this matter. These will be cited: e.g. R. 53-Tr. 793 or R. 53-Exh. 168 as the case may be.

Supreme Court of the United States

OCTOBER TERM, 1968

No.

INTERSTATE INVESTORS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

TRANCONTINENTAL BUS SYSTEM INC., Intervenor-Defendant,

Appellees.

ON APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

This appeal is from an order made by a specially constituted three-judge District Court for the Southern District of New York entered on July 22, 1968, refusing temporary and permanent injunctive relief against the order of the Interstate Commerce Commission dated Au-

gust 10, 1966, a number of supplemental orders relating thereto and dismissing appellant's complaint.

The orders of the Interstate Commerce Commission intentionally created a national duopoly in the intercity bus industry to the exclusion of any third competitive force.* The Commission authorized acquisitions by appellee, Transcontinental Bus System Inc. (hereinafter referred to as "Transcon") of the last nucleus of independent intercity bus companies operating 10,860 miles of certificated bus routes (App. C, p. A98). The acquisition increased Transcon's mileage by 23.8% (*ibid.*) and increased its net operating profit by 58% (R. 53—Exh. 21).** According to Transcon's report to its stockholders, this constituted the most significant acquisition in the history of the bus industry [Annual Report 8 (1966)]. As one consequence appellant was excluded from the intercity bus industry, which appellant had sought to enter through acquisitions of some of the same properties acquired by Transcon.

Opinions Below

The opinion of the District Court is reported in 287 F. Supp. 374 (S.D.N.Y. 1968) and at R. 69 of the record on

---

* Transcon in its initial brief to the Commission's Hearing Examiner presented the argument upon which it prevailed in the Commission as follows (App. H, p. A178):

> *"By approving these transactions, the Commission does create a duopoly within the bus industry,* one side of which will be considerably the weaker. True, *there is not then enough business left for the 'third force,' as proposed by Interstate."* (emphasis supplied).

** Earnings before acquisition $4,513,087; earnings after acquisition $7,141,746. The 37% figure in the exhibit does not properly reflect the actual increase.

appeal. It is also set forth in Appendix A hereto. The principal decision and order of the Interstate Commerce Commission is reported at 101 M.C.C. 529 and is included at R. 53. It is also set forth in Appendix B, hereto. The report and recommendation of the Hearing Examiner of the Interstate Commerce Commission is not reported; it is included at R. 41-82 and is set forth in Appendix C hereto.

Jurisdiction

Appellant brought this suit under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 to set aside the above mentioned orders of the Interstate Commerce Commission and for temporary and permanent injunctive relief.

A temporary restraining order was issued on September 18, 1966 (R. 1), and was vacated on September 22, 1966 (R. 4). The complaint was filed on October 5, 1966 (R. 7). Hearing on issuance of temporary injunction took place on May 25, 1967 (R. 67). Upon this hearing, at the suggestion of the Court, all parties consented to submit the controversy for final disposition upon the basis of the briefs filed and arguments made at the hearing (*id.* at 14-15).

The order of the District Court denying injunctive relief and dismissing the complaint was entered on July 22, 1968 (R. 69) and notice of appeal was filed in that Court on September 20, 1968 (R. 70).

The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court: *United States* v. *Baltimore & O.*

R. R., 333 U. S. 169 (1948); *ICC* v. *Hoboken Manufacturers R. R.*, 320 U. S. 368 (1943); *St. Louis & O'Fallon Ry.* v. *United States*, 279 U. S. 461 (1929).

Questions Presented

1. (a) Are the orders of the Interstate Commerce Commission, creating a national duopoly in the intercity bus industry to the exclusion of any third competitive force, authorized by and appropriate under the Interstate Commerce Act (Section 5 and Section 20(a)) and the antitrust laws of the United States (particularly Section 7 of the Clayton Act)?

(b) Assuming that the Commission upon proper hearing and proper evidence would have had the power to create a duopoly in the bus industry, is the decision below a proper exercise of such power in the light of:

(i) refusal by the Commission to consider whether the preservation of a viable independent competitive bus system was in the public interest on the ground that there was not before the Commission a specific application for the preservation of such a system;

(ii) the specific refusal to consider appellant's evidence and argument as to the desirability of preserving a viable competitive force in the bus industry;

(iii) the absence of specific and adequate findings?

2. Did the Interstate Commerce Commision discharge its duties under Section 11 of the Clayton Act by dismissing without hearing a complaint filed under that section, charging, *inter alia*, antitrust law violations not previously immunized by the Commission, on

the ground that the Commission's decision in a proceeding under Section 5(2) of the Interstate Commerce Act was dispositive of the Clayton Act charges?

3. (a) Should the District Court have enjoined and vacated the orders of the Interstate Commerce Commission because Transcon prosecuted its application in the Commission in violation of 18 U.S.C. § 1505 by means of false and misleading evidence including, to the knowledge of Transcon's trial attorney, false testimony by the principal executive officers of Transcon and of one of the acquired bus systems?

(b) As disclosure of the facts concealed before the Commission were not made until briefs were filed and the argument held in the District Court, should the District Court at the very least have returned the matter to the Commission for findings of fact in the light of the disclosures?

4. If Part V of the opinion in the court below may be construed as an adjudication that appellant did not have standing to prosecute the suit, or some part of it, then the additional question arises: Did appellant have standing to prosecute the suit in the District Court?

Statutes Involved

The Commission's orders purported to be made under the authority of Interstate Commerce Act § 5(2), 49 U.S.C. § 5(2) (App. D, pp. A135-37). If the Commission's orders are upheld, the acquisitions approved obtained the immunity from antitrust laws specified in Interstate Commerce Act § 5(11), 49 U.S.C. § 5(11) (App. D, pp. A138-39).

Appellant charges that the acquisitions approved by the Commission under Section 5(2) were in fact consummated, or at least partially consummated, in violation of Section 5(4), 49 U.S.C. § 5(4) (App. D, pp. A137-38).

Appellant likewise contends that the Commission had no power to approve of the specific applications here involved under Section 5(2), citing, among other statutory provisions, the national policy of the Motor Carrier Act of 1935 (Act of Aug. 9, 1935, ch. 498, § 202(a), 49 Stat. 543; App. D, p. A134), as well as the national transportation policy stated in the consolidating amendment to the Interstate Commerce Act in the Act of September 18, 1940, ch. 722, Title I, § 1, 54 Stat. 899 (App. D, pp. A134-35).

Appellant also charges that the Interstate Commerce Commission failed in its duty under Section 11 of the Clayton Act to enforce Section 7 of that Act (15 U.S.C. §§ 18, 21; App. D, pp. A139-43).

Incidentally involved in appellant's charges concerning the prosecution of Transcon's application with false and misleading evidence, is the prohibition against such conduct found in 18 U.S.C. § 1505 (App. D, p. A144), and the prohibitions against perjury (18 U.S.C. § 1621; App. D, p. A145) and conspiracy (18 U.S.C. § 371; App. D, p. A144).

Appellant's argument spelling out motive for the false testimony and concealment of facts also involves a section of the Internal Revenue Code dealing with corporate acquisitions (Internal Revenue Code of 1954, § 368(a)(1)(B); App. D, p. A146).

Statement Of The Case

A. The Bus Industry And The Place of The Challenged Acquisitions Therein.

In 1964 the intercity bus industry carried passengers 22.7 billion passenger miles* as compared with 18.4 billion for the railroads (14 billion exclusive of commuter service) and 45.4 billion for the airlines (R. 41-4).

In this very substantial industry the Commission through a series of decisions had by 1964 permitted Greyhound to establish a major bus line system operating on a national basis.**

The other major, albeit somewhat smaller, national system was operated by appellee Transcon.*** From time to time Transcon, like Greyhound, had been permitted by the Commission to acquire independent bus lines and Transcon did so both inside and outside of the National Trailways System (a confederation of bus systems dominated by Transcon).****

---

* A passenger mile is the transportation of one passenger for one mile (R. 53-Tr. 27).

** Greyhound has been granted approval for 121 acquistions of control between 1936 and 1963 (R. 53-Initial Brief of Transcon, Jan. 25, 1965, pp. 77-88; App. E, pp. A147-58).

*** Transcon, however, has grown by acquisition during the last decade at a rate far in excess of Greyhound's—*e.g.*, during the period 1952-1962, Greyhound's route miles increased only 5.5% while Transcon's almost doubled (94% increase) [*Greyhound Corp.-Control-Tex., N. Mex. & Okla. Coaches,* 101 M.C.C. 655, 673 n. 12 (1966)]. If the 10,860 route miles added by the instant acquisitions (App. C, p. A98) are added to the figures in the table just cited, then Transcon's increase in twelve years is 135%.

**** Transcon had obtained approval for 34 acquisitions of control prior to the present proceeding (App. E, pp. A159-63), has acquired

(*Footnote continued on following page*)

There remained as an independent competitive force a nucleus of bus lines based in the eastern and southeastern part of the United States. These controlled a north and south route along the Atlantic coast states from New England to Florida, and likewise formed an important link in a route competitive with both Greyhound and Transcon between the southwest and the northeastern seaboard. The principal independent companies which together with subsidiaries and affiliated companies constitute this independent nucleus were Queen City Coach Company (Queen), Safeway Trails Inc. (Safeway), Virginia Stage Lines Incorporated (Virginia), Carolina Coach (Carolina) and Tamiami Trailways (Tamiami).* They operated over 10,000 miles of intercity bus routes (App. C, p. A98).

(*Footnote continued from previous page*)

bus systems involved in this proceeding and has subsequently acquired three other bus carriers despite appellant's objection raised before the Commission that such added acquisition by Transcon in furtherance of Transcon's duopoly plan would be cumulative in effect and be violative of law. *Transcontinental-Control—Southern Stages and Atlantic Stages* MC-F-8738 decided June 28, 1968 and *Transcontinental-Control-Edward Motor Transit Co.*, MC-F-9860 effective July 19, 1968. By order served Aug. 5, 1968, in Dkt. MC-F-9638 the Commission refused to find that the issue of duopoly involved "issues of general transportation importance" as required under its Rule 1100.101(a)(4) and by order dated July 14, 1967 declined to stay the additional acquisitions pending resolution of the present proceedings now before this Court. The above acquisitions added 1080 and 1435 route miles to Transcon's operations (See R. 53 Exh. 74, pp. 4-6 for comparative revenue data on these companies). Edwards was not a Trailways member.

* The control of Virginia and Safeway assured control also of Trailways of New England and a one-third interest in Service Coach Lines. Control of Queen assured control over Smoky Mountain Stages, Georgia-Florida Coaches and Ft. Bragg Coach Company and (in conjunction with Virginia) of Tennessee Trailways, Carolina Scenic Stages, Coastal Stages Corporation and the Gray Line of Charleston, South Carolina (App. C, pp. A77-78, 83-84, 93).

The most strategically located of these lines was Queen. It was a key link in the independent competitive north-south route between New England and Florida and also furnished a key link in an independent competitive route between Texas and the Washington-New York-New England area (R. 53-Tr. 84, 384 & Exh. 2). Generally speaking, the Queen lines radiated from its headquarters in Charlotte, North Carolina to Atlanta, Chattanooga and Knoxville in the west, Lake City, Florida in the south, Charleston and Wilmington, North Carolina in the east and Raleigh-Durham in the north (App. C, pp. A93-94). Exhibit 39 before the Commission showing certificated routes of Continental Trailways after consummation indicates the precise location of the routes acquired by Transcon (which for present purposes is identical with "Continental Trailways") under the challenged Commission decision (R. 53-Exh. 39).

B. Appellant Interstate Endeavors To Become A Competitive Factor In The Bus Industry By Acquiring Queen.

"In the 1960's, Interstate and its President, Burt, became interested in welding the Trailways carriers running along the Atlantic Seaboard into a single unit" (App. A, p. A6). In this endeavor "to penetrate the intercity bus industry" Interstate "offered to purchase from their stockholders first Queen's shares and later those of Tamiami." (App. C, p. A105).* It was appellant's plan to acquire Queen and the companies controlled by it, then negotiate for the purchase of Tamiami Trailways connecting to

---

* Tamiami operated from Atlanta to southern Florida (R. 53—Exh. 2).

the south and Carolina Coaches to the north (R. 41-8). Such acquisitions would achieve a system sufficiently comprehensive to stand on its feet and withstand the predatory practices of the two large competitors (Greyhound and Transcon) (R. 53—Tr. 1176-77), especially the routing of through traffic around any system which offered a threat of competition. Combination with Virginia Stage and Safeway could follow and the few isolated independents in the west could later become part of the third system (R. 53—Tr. 1174-93).

Appellant negotiated for many months with Queen executives and stockholders. Finally, in the spring of 1964, appellant believed the negotiations "had advanced to 'satisfactory stages of agreement'" (R. 41-82-18). The agreement involved acquisition of Queen and an affiliated company, General Realty and Insurance Corporation (GRIC)* and an intrastate bus carrier controlled by certain of Queen's shareholders (Eastern Carolina Corporation). The price was to be $250 cash per share for Queen and GRIC or a total of about eight million dollars, including Eastern Carolina (R. 41-13).

Interstate had obtained the necessary financing (R. 41-12). Plaintiff's accountants had been given access to the records of Queen (R. 41-15). Plaintiff's attorneys had contacted the Commission to determine the procedure required for obtaining the Commission's consent if that were deemed necessary (R. 41-17).

The agreement which Interstate had negotiated for the acquisition of Queen was, however, never consummated.

---

* This corporation owned terminal facilities used by Queen City and also one-third of Georgia-Florida Coaches, a connecting carrier forming a part of the Queen City group (App. C, p. A93).

C. To Achieve The Duopoly Transcon Acquires The Bus System Which Plaintiff Had Sought To Acquire.

Unbeknown to plaintiff, at about the time when its negotiations with Queen had come to fruition, Transcon became active. Transcon had in the past been interested in acquiring Queen and had conducted casual on-and-off negotiations with several major Queen stockholders (App. A, p. A7). As the court below observed: "When it learned of the possible Queen-Interstate deal, * * * Transcon immediately started negotiating in earnest" (*ibid.*).

With this turn of events, the principal executives and stockholders of Queen delayed formalizing their agreement with appellant and finally, by letter dated April 28, 1964, spelled out terms upon which they would be willing to enter into an exchange of stock with Transcon at the rate of one share of Queen and GRIC stock for eight shares of Transcon stock (R. 41-20).

But Transcon was also advised in the letter of April 28 that "some of our stockholders wanted a minimum guarantee of cash and I [Love, Queen's president] enclose an offer by Transcontinental to buy back this stock for $31.25 per share. This is an integral part of our offer to sell the stock of Queen and General Realty and if it is not accepted the offer contained in the signed contracts is withdrawn" (*ibid.*). It will be noted that the cash buy back amounted to $250.00 per share of Queen and GRIC stock—the same amount at which appellant had negotiated for the cash purchase of such stock.*

---

* The $250 per share minimum guarantee was subsequently repeated as a requirement needed to induce the Hardison (controlling more than twenty per cent of the Queen stock) family to accept Transcon's exchange of shares offer. (R. 53—Exh. B to Complaint in MC-C-4969, Minutes of Queen Board meeting of May 15, 1964, pp. 2-3).

The same letter imposed three other conditions upon a sell out to Transcon: (1) a satisfactory employment contract for Queen's president, Love, (2) a satisfactory arrangement to buy from the Queen stockholders stock of an affiliate bus line, Eastern Carolina Corporation, and (3) a satisfactory contract for the continuation of the purchase of parts and services from the Transport Supply Corporation, a corporation owned by some of the Queen stockholders (*ibid.*). The communication to Transcon concluded with the statement "All of the things set out in this letter are considered as integral parts of the whole trade and neither may be accepted without the acceptance of all" (*ibid.*).

The record shows no further communication between these parties until the purchase agreement dated "as of May 16, 1964" was submitted by Transcon to Queen (R. 41-21). This agreement contains none of the four integral conditions set forth in the letter offer from Queen. But it does provide in article IX, § 9.3 that the agreement is conditioned upon obtaining from the Internal Revenue Service a ruling letter to the effect that the exhcange of stock will not result in the recognition of gain or loss for federal income tax purposes (*id.* at 6-7). It is plain that as far as the formal contract was concerned the parties sought to cast the acquisition as a "B" reorganization in which the sole consideration* would be the voting stock of Transcon.

---

* See Internal Revenue Code of 1954, § 368(a)(1)(B), construed to forbid any payment whatever except voting shares. *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194, 198 (1942); *Turnbow* v. *Commissioner*, 368 U. S. 337 (1961); Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders* 521-22 (2d ed. 1966).

But at some time Transcon had apparently agreed to the conditions of the April 28th letter. For, on May 21, 1964, the Queen board of directors, prior to ratifying the contract dated "as of May 16, 1964," passed a series of resolutions which, insofar as Queen was able to do so, fulfilled each of the conditions stated in the April 28, 1964 letter (R. 41-20a-2-3). The directors approved a new employment contract for Queen's president, Love; they approved a contract to purchase the stock of Eastern Carolina Corporation for cash; and approved a contract for the continuation of the purchase of parts and services from the affiliated Transportation Supply Corporation (*ibid.*). These actions were taken with the assent of Transcon because they occurred subsequent to May 16 (R. 53—Tr. 835-39, 884-85, 908-10).

At this time there was no evidence as to how the fourth condition of the April 28th letter had been complied with, nor how the parties had decided to resolve the dilema brought about by the conflict between the essentials of a "B" reorganization for tax purposes and the requirement of some of the Queen stockholders for cash. It is the subsequent discovery of how this dilema was resolved which gives rise to the charge that Transcon prosecuted its application in the Interstate Commerce Commission corruptly in violation of 18 U.S.C. § 1505 and initially continued its deception in the court below.

The May 16, 1964 agreement between Transcontinental, Queen and its stockholders provided for an exhcange of one share of Queen stock for 7.25* shares of Transcon

* The adjustment from 8 to 1 to 7.25 to 1 was effected to reflect the relative earning records of Queen and Transcon (R. 53—Tr. 141).

(R. 41-21-1). The participation of 80% of the stockholders of Queen was a condition of the contract (*id.* at 2).

The agreement required each Queen stockholder who became a party to the agreement forthwith to deposit his Queen stock with North Carolina National Bank of Charlotte as a depositary (*ibid.*). In exchange each stockholder would receive a transferable depositary receipt. The deposit was irrevocable as far as the stockholders were concerned. No Queen stockholder who had exchanged his Queen stock for a depositary receipt was entitled to withdraw the Queen stock unless the entire agreement should be terminated and notification of such termination had been dispatched to the depositary jointly by Transcon and Queen (*id.* at 2, 4). Upon the execution of this agreement the control over the disposition of nearly 100% of the Queen stock was thus effectively taken from the Queen stockholders and vested in Transcon (R. 53—Tr. 296-97). Appellant from that date on had no further opportunity to acquire the stock.

The exchange of Queen stock in the hands of the depositary for Transcon stock was to take place "when orders shall have been entered by the Interstate Commerce Commission * * * approving the transactions hereby contemplated" (*id.* at 4). Transcon agreed to apply to the Interstate Commerce Commission "for the approval of the transactions hereby contemplated" (*id.* at 3). Queen agreed to cooperate in the prosecution of the application (*ibid.*). The agreement contained a series of restrictions and special covenants (*id.* at 5-6), the effect of which was to forbid Queen without Transcon's consent to do anything other than continue its operation in status quo.

D. Transcon Secretly Acquires From Queen Stockholders Depositary Receipts Representing The Queen Stock, Thus Further Consummating The Acquisition Prior To The Required Approval By The Interstate Commerce Commission.

As was disclosed by appellees just prior to the argument in the court below, within less than thirty days after the approval of the Queen-Transcon agreement by the Queen directors, some of Transcon's principal executive officers and its attorney commenced acquiring from the Queen stockholders, who wanted cash, their depositary receipts for cash furnished by Transcon.* The acquisitions were concealed and made in the name of Swiss Highway Insurance Company of Zug, Switzerland, which, it later turned out, was an indirect subsidiary of Transcon (R. 53—Exh. 168).

These acquisitions were not minimal. They amounted to 10% of the total outstanding stock (22,264 shares) of Queen (App. F, p. A165). By such cash purchases of depositary receipts, Transcon acquired all rights to the Queen stock represented thereby, including all voting rights (R. 41-21-3). So Transcon partially consummated its contemplated acquisition of control over Queen before approval and authorization by the Commission as required under Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (1-4). Such authorization was not forthcoming until August 10, 1966—more than two years after the first of the acquisitions for cash and almost a year after the last such acquisition (App. F, p. A167). This partial unauthorized consummation, especially as it was concealed,

---

* (R. 54-40, n. 16; R. 57-25; R. 67-116. The foregoing are annexed hereto as Appendix F, pp. A164-67).

should, under previous decisions of the Commission, have been considered by the Commission in determining Transcon's fitness to be established as one of the sanctioned duopolists in the bus industry.

E. Simultaneously, Transcon Agrees Under Similar Contracts To Acquire The Principal Remaining Independent Intercity Bus Lines In The East.

Just prior to the acquisition of Queen, Transcon, on March 26, 1964, made an agreement to exchange its stock for the controlling stock of Virginia and on April 22, 1964, entered into a similar arrangement for the acquistion of Safeway stock (App. B, pp. A47-48). Prior to Commission approval, Transcon acquired 4% of the stock of Virginia by purchasing depositary receipts representing such stock, and also purchased 21% of the Safeway stock (R. 41-24-4).

As above noted, the foregoing acquisitions, together with the Queen acquisition,* eliminated, as Transcon admits (App. H, p. A178), the last opportunity for an independent competitive force in the bus industry as proposed by appellant. The acquisitions together covered over 10,000 miles of certificated routes, enlarged Transcon's mileage by almost 25% (App. C, p. A98), and increased its net operating profit by almost 60% (R. 53—Exh. 21). It was, as Transcon admits [Annual Report 8 (1966)], the most significant acquisition in the history of the bus industry.

---

* This also included acquisition of 13% of GRIC which owned 33½% of Georgia-Florida.

F. Transcon's Application For Authorization Of Its Acquisitions By The Interstate Commerce Commission And Appellant's Intervention.

On May 7, 1964, Transcon filed its original application seeking authority under Section 5 of the Interstate Commerce Act to acquire Virginia and Safeway (Docket No. MC-F-8744) (App. B, p. A41). This application was supplemented by an application under Section 20(a) of the Interstate Commerce Act on the Finance Docket (No. 23123) under which Transcon sought authority to issue 824,158 shares of its common stock in order to implement the acquisition of Virginia and Safeway (*id.* at 42).

On June 5, 1964, Transcon filed its application in Docket No. MC-F-8774 to seek authority under Section 5 for the acquisition of Queen. On the same date it filed in Finance Docket No. 23159 an application under Section 20(a) to issue 219,356 shares of common stock in order to implement its acquistion of Queen (*ibid.*).

The applications in general were routine. The Queen application is significant in two respects: (1) The application was conditioned, as was the written agreement of acquisition, upon a ruling by the Internal Revenue Service that the exchange of Transcon stock for the Queen stock give rise to no recognition of any gain or loss for federal income tax purposes (App. A, p. A16); (Accordingly, without a ruling to that effect from the Internal Revenue Service the condition upon which the application was presented would not have come about and the Commission would not have been empowered to authorize the proposed acquisition); (2) Nowhere in the applications did it appear that, contrary to the terms of the acquisition agreement

presented to the Commission, Transcon, through the activities of its own officers and with its own funds, would, prior to Commission approval, acquire all rights in some 10% of the voting stock of Queen and 4% of the voting stock of Virginia.

The Commission recognized appellant as an interested party by permitting it to intervene in the proceedings in opposition to Transcon's application (R. 53—Tr. 89-93).

G. Transcon Adduced No Evidence Before The Commission To Show Any Public Or Private Necessity For Its Acquisition.

Transcon's various applications having been consolidated for hearing, such hearings commenced on September 9, 1964. The nature of the evidence presented by Transcon was largely routine. It consisted of standard financial statistics and information, description of routes, stereotyped evidence as to Transcon's fitness and ability and matters of that kind. Transcon in its case, while admitting that the acquisition would create complete duopoly in the bus lines to the exclusion of any third force (App. H, p. A178), made no effort to justify this state of affairs, as opposed to the continued existence of the independent bus lines forming the nucleus of an independent competitive force. Transcon's sole argument was that it was smaller than its partner in duopoly, Greyhound, and that accordingly it should be strengthened (*ibid.*).

Evidence to support the necessity of eliminating the remaining independent companies was totally lacking. The Examiner, for example, adopted as his own a statement by an authority in the bus industry that "under the steady hand of president Maurice E. Moore, Transcontinental, too,

makes a good thing of the bus business" (App. C, p. A116). That the evidence did not indicate any necessity for these acquisitions in order to keep Transcontinental competitive with Greyhound is obvious from the Examiner's finding that in spite of Greyhound's large size, "Greyhound's excess of passenger revenue over expenses is minimal" (*id.* at 117-118).

As far as the acquired companies are concerned, the evidence did not show that any of such companies were in poor financial condition or were in any way unable to serve the public adequately. Indeed, Transcon, in its brief in the court below, well summarized the evidence on this point as follows (R. 57-62):

> "Each of the companies acquired are excellent properties. Each was in good shape financially (See Exs. 53, 54, 77, 78, 130, 131), has a sufficient fleet of modern, well-equipped buses (Exs. 45, 70, 71, 118, 119, 120; Tr. 602-603) and maintains adequate terminal facilities (Tr. 592, 458)."

So it is undisputed that the duopoly was not required to preserve the status of the acquired companies.*

Through service by pooled operation over the routes in question existed without any acquisition by Transcontinen-

---

* The foregoing is a complete answer to the Commission's contention in the court below (R. 54-19-20) that a denial of Transcon's application "would have left Transcon and the three companies to struggle against Greyhound competition". There is no finding and no evidence in this record to the effect that either Transcon or the three independents which it absorbed were engaged in a struggle against insuperable odds. Indeed, as we have shown above, the evidence is quite to the contrary. In fact, when Transcon distributed 51% of the shares of Western Sales, Ltd., to Transcon's shareholders, it surrendered without return $1.2 million in income per year (R. 41-62—consolidated earnings statement).

tal (See, *e.g.*, R. 53—Tr. 381-382, 384). Such routing operated smoothly for all parties concerned were interested in maintaining the best through schedules in order to obtain the business (R. 53—Tr. 385-386):

> "We found that everyone involved was most anxious to establish these through services so we could get some people using our buses. And you just don't find that there is a lot of squabbling * * *."

An officer for one of the acquired companies, testifying to the pool operations taking place prior to the acquisition, reaffirmed the proposition: "We have had very close cooperation, and over the years never the least bit of friction in the operation of the three companies" (R. 53—Tr. 1151). So the record would not support a finding that the independent companies which Transcon sought to acquire failed to give adequate service to the public either individually or as part of the joint operation. And no such finding was made.

The record here is even deficient in the usual stereotyped evidence relating to expected economies and savings resulting from the proposed acquisitions. There was testimony as to vague hopes for such economies but no *pro forma* statement or substantiating exhibit among the 168 exhibits showing any dollar savings actually forecast was ever submitted (R. 53—Tr. 463). The claimed savings related to dubious economies from expected increased purchasing power, not from lower operating costs (R. 53—Tr. 401, 441).

So the record here gives rise to the same suspicion voiced in the dissent in *McLean Trucking Co.* v. *United States,*

321 U. S. 67, 94 (1944), that "the hand of the promoter seems more apparent than the transportation need."

Experience has reinforced suspicion. Hard on the heels of Commission approval in this cause, Transcon has been involved in a series of additional mergers and acquisitions both within and outside of the bus industry.*

H. Appellant's Evidence As To The Desirability Of Preserving An Independent Third Competitive Force Is Rejected.

Appellant, as intervenor, endeavored to establish its thesis that the real issue before the Commission was the public interest at stake in the establishment of a duopoly and the undesirability of eliminating from the competitive scene the last nucleus of independent intercity bus lines. In this endeavor appellant met with no success either before the Examiner or the Commission. It was the Examiner's view (R. 53—Tr. 1096):

> "Well, that is not the problem before the Commission. The Commission has a specific case before it. It either approves it or denies it."

Appellant produced an expert witness to show an alternative to combining the independent southeastern companies with Transcontinental. As to such evidence, again the Examiner took the position (R. 53—Tr. 1173):

> "But the Commission has no application or had no application for any form of approval as a result of

---

* See p. 7, n. * * * *, *supra*. On June 17, 1968, Transcon also acquired a 97% interest in Delta Steamship Co., 34 Standard & Poor's Corp., Over the Counter & Regional Exchange Stock Reports, § 33 at 5358 (Aug. 2, 1968).

> that study, and the Commission can only act on matters before it."

Appellant suggested to the Examiner (R. 53—Tr. 1174):

> "You are being asked to decide the future of the inter-city bus industry in the United States, and there are no other alternatives before you."

to which the Examiner replied (R. 53—Tr. 1174):

> "The Commission can only act on what is before it. I don't want to discuss it any more."

Appellant also moved that application be made to the Commission for the assignment of an advisory economist who would "file an advisory brief with the Examiner so that the Examiner will have available for the record material relating to monopoly aspects of this acquisition proposal" (R. 53—Tr. 1103). Transcon's counsel made strenuous objection to this application (R. 53—Tr. 1108-1112). The Examiner denied appellant's motion but permitted appellant to apply to the Commission which, according to the Examiner, "has the power to supply me with economists or any other advisor" (R. 53—Tr. 1112). Such application having been made, appellant was advised on the last day of the hearings, "Commissioner Tuggle has denied your request, Mr. Burt, for the hiring or having the Commission have an economist at this hearing to represent the public interest" (R. 53—Tr. 1282).

In his report the Examiner, referring to what he considered appellant's improper endeavor to adduce evidence relating to the desirability of keeping alive a third competitive force, noted that appellant had been admonished to

desist from offering irrelevant evidence, such as its question of a Transcon witness (App. C, p. A123):

> "I want to ask this witness whether this group [of independent companies on the Eastern Seaboard], as a third force in the industry, would constitute a viable, efficient economic unit."

The Examiner bolstered his rejection of such evidence by emphasizing that "The Commission 'has no application * * * for any form of approval as a result of' [plaintiff's study concerning the viability of a third competitive force] and the Commission can only act on matters before it" (*id.* at A125).

So, the Examiner rejected without resolution the key question: Does the public interest call for duopoly or the preservation of viable independent competitive bus systems? The Commission concurred (App. B, pp. A65-66). There is no indication, either by the Commission or the Examiner, as to the type of application appellant could have filed to bring before the Commission the basic issues of public interest which should have been disposed of in deciding the Transcon application.

I. The Examiner's And The Commission's Decision Lack Appropriate Findings On The Antitrust Law Issues.

The Examiner's decision was served on November 1, 1965. A great deal of it concerns itself solely with the usual ritualistic propositions. For example, pages are spent in discussing the corporate history, affiliation, operations and financial data of Transcon and of the acquired companies and a review of the acquisition agreements (App. C, pp. A77-98). There is a similar review of the corporate position of the protestant Greyhound

(*id.* at A102-05). The contentions of the parties are briefly stated (*id.* at A107-10). Two pages are devoted to discussing public interest (*id.* at A98-102). From this discussion it appears that the acquired companies, as independent operators, cooperated extensively in through service pooling arrangements, a proposition fully supported by the evidence (R. 53—Tr. 428, 680, 924). There is no finding that such arrangements did not meet the public's requirements.* There is no condition in the order which would require any better through service under Transcon's ownership than had theretofore been furnished under the pooling arrangements which involved Transcon, among other companies, and, to a lesser extent, Greyhound. While the Examiner speaks about conveniently coordinated schedules and more efficient use of equipment (App. C, p. A122), no facts are found to indicate either that more efficient use of equipment will in fact be made or that the through schedules will be any better coordinated than they had been under the extensive National Trailways Bus System pooling arrangements in which all carriers involved are found to have participated (*id.* at A80).

All corporations involved were in healthy financial condition (R. 57-62). There is no finding that the duopoly created to the exclusion of any independent competitive force is required to preserve any of the acquired bus lines or Transcon.

---

* The examiner's reference (App. C, p. A101) to one situation in which a single scheduled through service was partially eliminated by Transcon (because Transcon's leg of the journey was unprofitable) is not only *de minimis*, but is totally irrelevant for the Commission's order does not require Transcon to restore this or create any other through service in the public interest.

On the antitrust issue, the Examiner addressed himself entirely to the question of enhancing Transcon's position vis-a-vis Greyhound. As we have pointed out above, the Examiner refused specifically to consider appellant's argument or evidence that the maintenance of a third competitive force in the industry would be desirable. He held that there was no application before him to justify such inquiry (see pp. 21-23, *supra*).

The Examiner's recommended order permitted all of the acquisitions for which Transcon had applied, attached no conditions as to operations and required no guarantees as to continued or extended through service or any conditions of any other kind for the protection of the public (App. C, pp. A130-33).

Insofar as here material, the Commission, in its decision rendered August 10, 1966, merely affirmed the Examiner's opinion without adding anything thereto (App. B, p. A40). The Commission's opinion also contains several pages of formal recitals dealing with the parties and the agreements (*id.* at A40-49). The contentions of the parties are summarized (*id.* at A49-58). Thereafter certain contentions of Greyhound and Investors are discussed briefly. Appellant's antitrust arguments are given short shrift (*id.* at A61-64).

Concerning appellant's argument that a third competitive force should be permitted to exist, the Commission approved the Examiner's piece by piece approach to industry-wide duopoly, stating that "no application has been filed for the consolidation of any of the several carriers herein involved under the ownership of Investors for the creation of such a "third force." (*id.* at A65). The Commission takes the position that there is no reason why

there should be more than two bus lines in the field and that the question is whether the applicant will provide an improved service to the advantage of the riding public (*id.* at 65-66). The Commission, as did the Examiner, makes no findings as to any shortcomings in the operations of the acquired companies as independent operators. It makes no findings as to how the riding public is to be advantaged and it attaches no conditions to its approval of the acquisitions which would require any better or increased or more efficient through service or reduction in cost to the public. It made no findings as to the impact of Transcon's emphasis on "through service" (R. 53—Tr. 347) upon the requirements of local and regional service more adequately supplied by smaller carrier (R. 53—Tr. 760; also see discussion in R. 53—Appellant's Exceptions dated Jan. 3, 1966 at pp. 3, 44-6).

J. The Corrupt Prosecution Of Transcon's Application In The Interstate Commerce Commission By Means Of Testimony Known By Transcon And Its Counsel To Be False.

Appellant, having negotiated at length with stockholders of Queen for acquisition of their stock, was well aware of the requirement by some of the stockholders for cash as a condition to consenting to the sale of their stock (see pp. 11-12, *supra*).

Appellant, believing that cash must have been assured to such stockholders and, indeed, paid in some fashion for the stock as part of Transcon's acquisition of Queen, sought from the inception of the hearings before the Interstate Commerce Commission to obtain the facts. If, as appellant believed, Transcon had acquired Queen shares for cash, then (1) the acquisition by Transcon was not in fact

as portrayed to the Commission in Transcon's application for Commission approval; (2) there would have been a partial consummation of Transcon's acquisition prior to the approval by the Commission. Such a state of facts, in appellant's view, would have shown a violation of Section 7 of the Clayton Act and would further have placed in issue Transcon's fitness to be awarded by the Commission the routes which it sought to acquire.

Accordingly, appellant sought by cross-examination to discover if and how cash was channeled to the Queen stockholders in a transaction which had been cast as a stock only "B" reorganization for obvious tax reasons. The most probable method for placing cash in the hands of the Queen stockholders who demanded it appeared to be the purchase of depositary receipts.

Appellant directed its search for the truth in that direction. Transcon's financial vice president, Scheitel, testified on September 10, 1964 before Examiner Winson. There is no doubt that Scheitel's testimony on cross-examination was intended to leave the impression that Transcon was not a party to any commitment involving the purchase of the depositary receipts for cash, that it did not know who had bought the depositary receipts and that Transcon's only participation in the matter had been to suggest the possibility that Goodbody & Co., which was making a market in defendant Transcon's stock, might possibly be interested in "making a market" for depositary receipts (R. 53—Tr. 200-204; App. G, pp. A168-71).* The following are examples of this testimony:

---

* This at a time when he, himself, had personally engaged in buying the depositary receipts with Transcon's funds for a Transcon subsidiary (App. F, p. A166).

"Q. And, to your knowledge, have the trust [depositary] receipts been marketed?

A. I understand, I think somebody sold, yes." (*id.* at A168)

"Q. You at no time discussed with any member of the Love family, or any other principal stockholder—there are five principal stockholders of Queens—the relative amount of discount that would be available to them at Goodbody and Company, that it would be ten or fifteen percent over the equivalent market price of shares of Trancontinental Bus System?

A. I don't—we didn't even—there wasn't any assurance on our part at all that there was going to be a market for the depositary receipts." (*id.* at A169)

"Q. But you know that some [depositary receipts] has been sold?

A. I don't know who bought it." (*id.* at A170)

The Interstate Commerce Commission hearings recessed for a time. Plaintiff, having previously commenced breach of contract and common law tort actions in the United States District Court for North Carolina against stockholders of Queen, conducted some discovery proceedings in those actions during the recess. Appellant discovered for the first time that there had in fact been substantial sales of depositary receipts by Queen stockholders, including L. A. Love, president of Queen, and his son (R. 41-34).

According to Love, his depositary receipts were sold through an entity known as First Securities Corporation of Durham, North Carolina. He perpetuated the impression created by Transcon's Scheitel that Transcon had no connection with the purchases of the depositary receipts

(App. G, pp. A172-74). Love denied stoutly that he knew for whose account First Securities had purchased the stock. He claimed that he had selected First Securities by chance and that he did not know who had bought the depositary receipts of the other Queen stockholders (R. 53—Tr. 851-53, 865; App. G, pp. A172-74). Love reiterated that he did not know who bought the depositary receipts (*id.* at p. A174):*

> "Q. Do you know, Mr. Love, who actually bought your depositary receipts?
>
> A. No, sir, I don't. The security company on here sent me a check for them that's all I know."

Shortly thereafter, M. E. Moore, president of Transcon, fully supported the impression which his vice president, Scheitel, and Queen's president, Love, had sought to leave, *i.e.*, that the purchasers of the depositary receipts were wholly unknown to Queen and Transcon and that Transcon had absolutely no part in furnishing the funds for purchasing such securities. For example, Moore testified (R. 53—Tr. 971-73; App. G, pp. A174-76):

> "I am kind of curious about these transferable depositary receipts, Mr. Moore. *Will you* answer this question for me? *Do you know, first of all, have you, or any officer, to* your knowledge, of Transcontinental, Continental, *or its subsidiaries, agreed, by contract or by oral agreement, to supply the funds necessary to*

---

* But the fact was that his depositary receipts were bought for Transcon's Swiss subsidiary with Transcon funds by the very officers of Transcon with whom Love had just recently negotiated the Queen stock acquisition (App. F, p. A167; R. 53—Tr. 199, 252-53).

purchase the depositary receipts or to make a market in these depositary receipts?
A. *They have not.*"

• • •

"Q. And a final question: What you are saying here in this hearing is that you know nothing about the market that was made in these transferable depositary receipts?

A. I don't know that there is a market as such.

Q. But you did seek—

A. I understood from the testimony yesterday that there had been some trading. I mean, is this one, or is this ten trades, or one trade, or a hundred trades? How many, I have no knowledge of.

Q. *And you are also saying whether there was one or ten, you know not how the trade or how the market was set up?*

A. No. *Transcontinental has no commitments. I mean, we have no part of it.*" (emphasis supplied).*

The foregoing testimony by the three principal executive officers of the corporations involved in Transcon's acquisition of Queen was to the knowledge of Transcon's counsel before the Commission, Goff, false and misleading (App. F, p. A164). This was never discovered during the proceeding in the Interstate Commerce Commission but was, for the first time, brought to light by *ex parte* investigation by the Commission's attorney, the result of which was casually added as a footnote to the Commission brief in the court below, filed just prior to the argument in

---

* But at this time every acquisition of depositary receipts had been made with Transcon's funds through the agency of Transcon's executive officers and counsel and by a subsidiary of Transcon (App. F, p. A164).

that court (*id.* at A164). It now stands as admitted that all of the purchases of depositary receipts were made by Goff, Transcon's general counsel and its counsel before the Commission, by Scheitel, Transcon's vice president and witness, and by two other officers of Transcon (*ibid.*).

What is more, while title to the depositary receipts was taken by a Swiss subsidiary of Transcon, it was conceded on the argument in the court below by means of an exhibit handed up by counsel for Transcon that the funds for the purchase of the depositary receipts were Transcon's (R. 67-116; App. F, p. A167).

On the argument, counsel for the Interstate Commerce Commission for the first time conceded as to the Scheitel-Love-Moore testimony (R. 67-126; App. F, p. A166):

> "Now, it is our position on this that we are not vouching for the credibility of the testimony of the witnesses insofar as they gave testimony which may be read as denials of knowledge of purchases. If the testimony can be read that way, and some of it can, it is false, and it is clearly false as to Sheitel who is named as one of the four people that did the buying. There is no question about that."

While for some reason Scheitel is singled out in this admission, it applies equally to Love and Moore who denied even more stoutly knowledge of purchases of the depositary receipts.

K. Appellant's Unsuccessful Efforts To Bring Before The Commission The Issue Of False Testimony.

As we have stated, the disclosure belatedly made in the court below had never been made while the proceedings

were pending before the Interstate Commerce Commission. On the contrary, Transcon concealed the truth.*

It was only through appellant's persistent effort that at least some of the truth came to light. In this effort appellant fought alone with no cooperation from either Transcon or the Commission.

Appellant had called the attention of the Internal Revenue Service to the fact that depositary receipts had been acquired by someone for cash (R. 41-42). As a consequence, the Examiner for the Internal Revenue Service, who had initial responsibility for passing upon the request of the parties for a ruling that the acquisition was without tax consequence, called Hunter Jones, the attorney for the Queen stockholders to inquire as to the existence of cash purchases which had not been disclosed in the application (R. 41-43). Jones, in turn, called Transcon's counsel, Goff, and, for the first time, learned that the depositary receipts had been acquired by a Swiss subsidiary of Transcon (*ibid.*). This discovery made in November 1964 embarrassed Jones who had been present at the Commission hearing when his client Love denied all knowledge of who bought the depositary receipts (*ibid.*). But Jones' embarrassment did not cause him or Goff to request a reopening of the proceedings before the Interstate Commerce Commision or to make any disclosure on the record. Indeed, no answer was even made to the Internal Revenue Service until several months later when a Washington tax attorney

---

* R. 53—Transcon Reply to Petition for Further Hearing, Nov. 5, 1965, p. 4; Transcon Reply to Exceptions, Feb. 14, 1966, pp. 73-74; R. 57-10, n. 2.

made the disclosure in February of 1965* (*ibid.;* R. 53—Exh. 168).

There the matter rested for another six months. Then the IRS, on the basis of the facts made known to it (not including, of course, the facts subsequently admitted in the court below), and certain other facts which, if known, might have lead to a different result (R. 59-87), gave a favorable tax ruling on the Queen-Transcon acquisition (R. 53—Exh. 168).

To satisfy the condition in Transcon's application to the Interstate Commerce Commission, the tax ruling was filed as an exhibit in June of 1965 (R. 53—Exh. 168). The ruling contained a recital of facts upon which the Internal Revenue Service had acted, including the following (*id.* at 2):

> "Transcontinental does not own stock (or depositary receipts representing stock) of Queen or Realty. However, Highway Insurance Company, of Zurich, Switzerland, a wholly-owned subsidiary of Western Sales, Limited, a Bahamian corporation, 49 percent of the stock of which is owned by Transcontinental, has purchased depositary receipts representing 1,387 shares of Queen and 829 shares of Realty.
>
> * * *
>
> "It is stated that there is no commitment, formal or informal by Transcontinental or any one acting on its

---

* The disclosure was not made until Transcon believed that Queen stockholders had purchased appellant's silence. In view of the false Moore-Scheitel-Love testimony, appellant could see no purpose in continuing its struggle further and so settled its North Carolina contract action for a nominal payment. Although Transcon had not been a party to the North Carolina action, it insisted upon receiving simultaneously an agreement from appellant that it would, among other things, abandon its objections to the Transcon acquisitions in the Interstate Commerce Commission (R. 41-41).

behalf to purchase Transcontinental stock from any of the shareholders of Queen or Realty after consummation of the proposed exchange, or to purchase depositary receipts *before* that time." (Emphasis supplied.)

While the record thus, for the first time, contained a modicum of evidence as to the untruth of the Scheitel-Love-Moore testimony, the disclosure to the Revenue Service was itself incomplete. The Internal Revenue Service had not been told that Transcon through its officers and with its funds, had purchased the depositary receipts even though such purchases were nominally made in the name of its Swiss subsidiary and it subsequently appeared that when some of the depositary receipts were acquired in the Swiss corporation's name, that corporation was in fact a 100% owned subsidiary (R. 57—10, n. 2 & App. F, p. A164).*

When appellant, as a party to the Interstate Commerce Commission proceeding, received a copy of Exhibit 168, it filed various applications, all designed to reopen the case in the light of newly discovered evidence so that a proper determination could be made concerning the part which Transcon and its witnesses had actually played in the cash acquisition of the depositary receipts.** All such efforts

---

* A difference which the author of the tax ruling considered material (R. 59-87).

** R. 53—Letter dated August 20, 1965, Requesting I.C.C. to Issue Clayton Act Complaint; Application to Examiner to Reopen Hearings, September 20, 1965; Petition to I.C.C. to Reopen Hearings, October 11, 1965; Petition for Reconsideration of Denial of Further Hearings, December 7, 1965; Letter dated December 8, 1965; Exceptions to Examiner's Report, January 3, 1966; Petition to Admit Additional Exhibits, February 21, 1966; Motion, February 24, 1966; Reply Briefs, February 28, 1966, March 1, 1966; Petition, May 26, 1966.

were summarily denied by the Commission without ever making a determination on the merits.*

Such denial followed vitriolic arguments by Transcon's attorney Goff charging appellant's counsel with all types of improper conduct for having the temerity to suggest that in view of the recent disclosure the witnesses tendered by Transcon might have committed perjury (R. 53—Initial Brief of Applicant, January 10, 1965, p. 100; Reply of Transcon to Petition by Interstate Investors, Inc. for Further Hearing, December 27, 1965, p. 7; Reply of Applicant to Exceptions, February 14, 1966, pp. 34, 36; in Ex Parte 65 (Sub. No. 3) Reply of Transcon, pp. 13-15).

The tenor of these arguments may be judged from the following statement in a formal printed brief before the Commission (Reply dated February 14, 1966, p. 34, *supra*):

> "There is not one shred of evidence in this Record, except the self-serving declarations and allegations of Burt [appellant's president and counsel] that Transcontinental made any arrangement or agreement with any stockholder of Queen, General Realty, Virginia or any other of the carriers here sought to be acquired, to supply cash for the purchase of the depositary receipts; or to agree that said depositary receipts would be purchased; or to set a price to be paid for them. This is another one of those many claims which Burt has repeatedly made, based only upon his own allegations and declarations supported by no evidence of Record."

---

* R. 53—Order Denying Petition to Reopen Hearings, November 25, 1965; Order Denying Reconsideration of Foregoing Order, August 10, 1966; Order Denying Stay of Section 5 Decision and Order, September 16, 1966; Order Denying Reconsideration of Section 5 Decision, November 16, 1966; Order Dismissing Clayton Act Complaint, May 18, 1966.

Counsel filing this document knew at the time it was filed that he had personally, along with three officers of Transcon, including the witness Scheitel, participated in all the purchases of depositary receipts with cash supplied by Transcon (App. F, pp. A164-67). This it is submitted was more than non-disclosure. It was active concealment of the truth.

L. Neither The Examiner Nor The Commission Made Findings Or Reached Conclusions With Respect To The Actual Facts Now Disclosed In Connection With The False Evidence Tendered By Transcon.

While appellant's application to reopen the hearings was pending the Examiner handed down his decision (App. C, p. A77). By way of a footnote (*id.* at A126, n. 15), the Examiner referred to the facts outlined in the letter ruling from the Internal Revenue Service (R. 53—Exh. 168). He did not weigh these disclosures against the Scheitel-Love-Moore testimony. He made no findings of fact as to the truth or falsity of the testimony now conceded to be false. He drew no conclusions concerning apellant's argument that, if the testimony were false and if Transcon had in fact acquired the depositary receipts, then there was a partial consummation of the transaction which had not been disclosed to the Interstate Commerce Commission, and, further, that there was a violation of Section 7 of the Clayton Act by virtue of such acquisition without prior approval by the Commission. Whatever might be the posture of the case, had the Examiner come to grips with this contention, the fact is that he failed entirely to do so.

The Commission's decision is similarly defective. The Commission fortified its prior failure to grant appellant opportunity for further hearing in the light of the disclosure contained in the Internal Revenue Service tax rul-

ing by refusing to accept and to consider additional data tendered by appellant (App. B, p. A68).* Respecting appellant's contention as to the purchase of depositary receipts, the Commission, as did the Examiner, simply recited the disclosures in the Internal Revenue Service tax ruling and concluded without more that the acquisition of some 10% of the Queen stock and 21% of the Safeway stock did not warrant a finding that Transcon has acquired control of those corporations (a totally irrelevant conclusion) (*id.* at A60). The Commission's only other reference to the depositary receipts is a conclusion that the purchase of the depositary receipts by Transcon's Swiss subsidiary did not constitute "a partial consummation of the transactions, which are based on an exchange of shares of Transcon's stock for shares of stock of the carriers to be acquired." (a complete *non sequitur*) (*ibid.*).

The Commission did not pass at all upon appellant's basic argument that while an exchange of stock was the ostensible method for Transcon's acquisition of control over Queen, in fact cash acquisition was also involved. The

---

* After the disclosures contained in Transcon's late-filed Exhibit 168 (R. 53) appellant attempted to introduce additional evidence and to have the hearings reopened. The Commission denied appellant's request on the basis of Rule 86 of the Commission's General Rules of Practice which provides in part that: "the Commission will not receive as evidence or consider as part of the record any documents, letters or other writings submitted for consideration in connection with any proceeding after closing of the hearing * * *." The Commission stated: "to accept and consider such late-filed exhibits and additional data, in the absence of a stipulation that same might be filed, would be deprivation of the right of applicants to cross-examination thereon" (App. B, pp. A68-69). The Commission, however, was not troubled by the fact that appellant was deprived of such rights with respect to the tax ruling letter, late-filed Exhibit 168 which contained information directly contrary to the facts as stated by applicant's witnesses at the hearing (see pp. 26-31, *supra*).

Commission did not weigh the Scheitel-Love-Moore testimony against such disclosure as appellant had been able to call to its attention. The Commission did not purport to pass judgment on the facts disclosed much later in the court below, all of which indicated only too plainly that the Scheitel-Love-Moore testimony was designedly false and that Transcon's counsel was well aware of its misleading nature. Had enough facts been in the record, the Commission would have had to conclude that a secret, unapproved, partial consummation of the acquisition transaction had taken place.

Accordingly, the Commission never decided the basic question as to Transcon's fitness to become the anointed second member of a duopoly. Such fitness might well have been found lacking.*

The Questions Presented Are Substantial

The questions presented raise basic issues in the bus industry not previously decided by this Court (1) respecting the accommodation between the Motor Carrier Act, now a part of the Interstate Commerce Act, on the one hand, and the antitrust laws on the other and (2) the effect of false testimony and deliberate concealment of facts upon Commission proceedings.

---

* Compare the Commission's own prior decisions which condemned secret partial acquisitions prior to Commission consent and denied application by those lacking respect for the law (*Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 (1962); *Lombard Bros., Inc.* v. *United States*, 226 F. Supp. 905 (D. Conn. 1964); *Watson Bros. Transp. Co-Lease-Burnett & Feighner*, 55 M.C.C. 277 (1949); *Brown Express-Purchase-Jones Motor Freight Lines, Inc.*, 55 M.C.C. 127 (1948); *Raymond Bros. M. Transp. Inc-Purchase-North American*, 37 M.C.C. 431 (1941). The prosecution of an application with false testimony would show a stronger propensity for illegal action than the conduct condemned in the determinations just cited (*F.C.C.* v. *WOKO, Inc.*, 329 U. S. 223 (1946)).

FIRST—The Commission's Decision Created A National Duopoly In The Bus Industry To The Exclusion Of Any Third Competitive Force In Violation Of The Commission's Duties, Both Substantive And Procedural.

Transcon, in total disdain of the antitrust laws, requested Commission approval of its vast acquisitions with the argument that such approval would create a "duopoly" within the bus industry on a nationwide scale as a consequence of which "there is not then enough business left for the 'third force' as proposed by Interstate" (App. H, p. A178).

Transcon's acquisitions were at least hastened by its decision to exclude appellant from the bus industry (App. A, p. A7).

The Examiner steadfastly, throughout the hearings and in his ultimate report, adhered to the opinion that he was concerned solely with the technical aspects of Transcon's acquisitions covered by its applications and the effect which such acquisitions might have on competition between Transcon and the other large established bus system, Greyhound pp. 21-23, *supra*). The Examiner refused repeatedly to permit applicant to establish that the acquired independent companies constituted a viable, independent force which should be permitted to remain independent of the duopolists (*ibid.*). The Examiner was of the opinion that evidence to establish the foregoing was wholly irrelevant to his inquiry because he did not have before him an "application" as to such independents (*id.* at 21-22). The Commission's decision followed the Examiner in all these respects.

We have summarized in the statement the total lack of findings and conclusions either by the Examiner or the Commission to justify the creation of a nationwide duopoly in the bus industry (pp. 23-26, *supra*). There simply are no facts found which would justify this drastic limitation of competition, existing and prospective. It must be recalled that there is no finding that Transcon was in any sort of financial difficulty. Indeed, as the Examiner pointed out, "Transcontinental, too, makes a good thing of the bus business" (App. C, p. A116), and it is likewise conceded that "each of the companies acquired are excellent properties. Each was in good shape financially * * * has a sufficient flow of modern, well-equipped buses and maintains adequate terminal facilities." (R. 57-62).

There is no finding that the acquired bus systems, including their pooling arrangements, did not give to the public adequate through service as well as local service (pp. 19-20, *supra*). There is no finding of any specific benefit to the public and Transcon's witnesses indicated that it and Greyhound would concentrate on "through business" (R. 53—Tr. 347) with no indication of how the interests of local and regional passengers were to be protected.

A. The Challenged Acquisitions Violate Section 7 of the Clayton Act.

As of the time of the proceedings in the Commission, Class I intercity bus carriers operated nationwide 783,189,000 vehicle miles and had total operating revenues in the amount of $527,829,000. Greyhound accounted for 447,814,000 vehicle miles* or 57% and obtained operating revenues

* Greyhound operates over 92,084 route miles (App. C, p. A102) which serve many major communities not served by Transcon or

(*Footnote continued on following page*)

of $323,388,000 or 61% of the total for the industry. Transcon, including the acquisitions for which approval was sought (64,611,120 vehicle miles), operated 184,900,000 vehicle miles (24%) and had operating revenues of $94,-296,351 (18%)** Transcon's acquisitions climaxed a rapid growth by numerous acquisitions which in a dozen years had increased Transcon's size by 135% (p. 7 n. *** *supra*).

Unless Transcon's acquisitions may properly be immunized under Section 5(2) of the Interstate Commerce Act, they are clearly violative of Section 7 of the Clayton Act. This Court has consistently struck down acquisitions when there has been a prior history of acquisitions and concentration in an industry. [*United States* v. *Continental Can Co.*, 378 U. S. 441 (1964); *United States* v. *Aluminum Co. of America*, 377 U. S. 271 (1964); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 365 n. 42 (1963); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 345-46 (1962)]. The Court summarized this underlying policy of Section 7 in the *Continental Can* case as follows (378 U. S. at 461-62):

> "Where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their

---

(*Footnote continued from previous page*)

independents (R. 53—Exh. 2 and appellants' Exceptions dated Jan. 3, 1966 at pp. 5-8). Transcon could expand its 45,575 route miles by filling these competitive voids instead of merely "cream skimming" as in the challenged acquisitions.

** These figures are derived from Exhibits 21 and 76 before the Commission (R. 53). Although Transcon submitted both of these exhibits, the figures vary. We assume the larger figures to be accurate.

> incipiency.' . . . Where 'concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.' . . .'' (citations omitted).

Where an oligopolistic situation exists in an industry, this Court has found further acquisitions unlawful even though the acquired company controlled a very small percentage of the relevant market [*United States* v. *Aluminum Co. of America, supra,* at 278 (1.3%); *United Sates* v. *Continental Can, supra,* at 461 (3.1%)]. In *United States* v. *Von's Grocery Co.,* 384 U. S. 270, 272 (1966), the combined companies after the merger controlled only 7.5% of the relevant market.

The Clayton Act prohibition has been held to be so stringent that, present oligopolistic concentration, the Court found violation of the Act without the necessity of elaborate proof of market structure and behavior or probable anticompetitive effects. (*United States* v. *Continental Can, supra,* at 458; *United States* v. *Philadelphia National Bank, supra,* at 363). Condemnation of acquisitions leading to a national duopoly would appear to be a foregone conclusion.

Equally offensive to the Clayton Act are acquisitions which prevent new entry into the field. [*Federal Trade Commission* v. *Proctor & Gamble Co.,* 386 U. S. 568 (1967).] The acquisition of Clorox by Procter & Gamble was found to violate the Clayton Act because, among other reasons it might dissuade new entrants into the bleach field. Mr. Justice Douglas, who wrote the principal opin-

ion for the unanimous court, pointed out particiularly (p. 579):

> "The acquisition may also have the tendency of raising the barriers to new entry.
>
> * * *
>
> "Thus a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox. [Footnote: The barriers to entry have been raised both for entry by new firms and for entry into new geographical markets by established firms.]"

Addressing himself to the type of proposition relied upon by the Commission in the present case, Mr. Justice Douglas pointed out (p. 580):

> "Possible economies* cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."

In the present instance it was conceded that the only economies would result from size and increased purchasing power, not lower operating costs (p. 20, *supra*).

As pointed out above, the history of the intercity bus industry has been a series of acquisitions routinely approved by the Commission whereby Greyhound and Transcon have bought up scores of companies (App. E, pp.

---

* Here there was not even concrete evidence of actual economies. In fact, Transcon plans to continue the acquired companies as separate corporate entities with separate managements. This arrangement is contrary to Commission policy but the Commission has declined to force Transcon to merge these companies (R. 53—Tr. 68, 102-105 & App. B, p. A69).

A147-63). And Transcon's own evidence demonstrated that entry into the intercity bus industry could be attained only through acquisition of existing companies (R. 53—Transcon Brief, Jan. 25, 1965 at p. 76). The present acquisitions have concededly foreclosed any such independent entry by eliminating the last viable nucleus of independent bus systems. Not enough business remains for even a third competitive force (App. H, p. A178).

Violation of the Clayton Act cannot be doubted. The question remains: Can such violation on the present record find shelter under the Interstate Commerce Act?

B. The Interstate Commerce Act Does Not Empower The Interstate Commerce Commission To Shelter The Challenged Acquisitions From The Clayton Act.

The Commission's power to approve, and thereby confer antitrust immunity* upon, the challenged acquisitions resides in Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. Section 5(2)(b)). That legislation authorizes the Commission to permit acquisition of one carrier by another if it finds that the acquisition "will be consistent with the public interest". "Public interest" is undefined by the statute. Under these circumstances, the Commission's interpretation of the Congressional design is peculiarly subject to judicial review. Irrespective of the Commission's original determination as to what may or may not be consistent with the public interest, it is the Court's "responsibility to say whether the Commission has been guided by proper consideration in bringing the deposit of its experience * * * to bear * * * in [determining] the public

---

* 49 U.S.C. Section 5(11).

interest." *Federal Communications Commission* v. *R.C.A. Communications, Inc.*, 346 U. S. 86, 91 (1953).

It can no longer be doubted that the public policy expressed by the antitrust laws is included within the public interest criterion of the statute [*McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86-7 (1944), even more pointedly so stated in the dissent (321 U. S. at p. 93); *Minneapolis & St. Louis Ry.* v. *United States*, 361 U. S. 173, 186 (1959)].

The declaration of Congressional policy introducing the Motor Carrier Act of 1935 not only supports the inclusion of antitrust principles in the "public interest" criterion, but makes it unlikely that Congress intended to empower the Commission to create a national duopoly to the exclusion of competition. Congressional intent declared it (App. D, p. A134):

> "* * * to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, * * * develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense * * *."

The preservation and fostering of "sound economic conditions" among carriers "in the public interest" and the promotion of "adequate, economical and efficient service at reasonable charges" suggests competition. Taken in the context of then existing antitrust policy of the United States, monopoly or duopoly does not appear to have been

the policy which Congress was endeavoring to implement when it enacted the Motor Carrier Act.

Senator Wheeler underscored this proposition when, in introducing the Act, he stated [79 Cong. Rec. 5655 (1935)]:

> "With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interest."

The consolidation of the Interstate Commerce Act and the Motor Carrier Act under the Act of September 18, 1940 (App. D, pp. A134-35), did not change in any respect here material the provisions of the Motor Carrier Act. Indeed, the substantial repetition of the Motor Carrier Act declaration of policy in introducing the 1940 Act reemphasizes the concern of Congress with the preservation of the competitive system (*ibid.*).

On the basis of a specific finding that "ample competition would remain," a majority of this Court upheld the Commission order under the Motor Carrier Act permitting the consolidation of certain truck lines in *McLean Trucking Co.* v. *United States, supra,* but the reasoning supports appellant's construction of the Act (pp. 86-7):

> "Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in *the creation of monopolies. To prevent the latter effect* and to make certain that the former was permitted only where appropriate to fur-

ther the national transportation policy, it placed in the Commission power to control such developments. The national transportation policy requires the Commission to 'promote . . . economical . . . service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, [or] undue preferences or advantages. . . .'' *The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends.''* (emphasis supplied.)*

In the present case, there is and could be no finding that ''ample competition'' remains after the authorized acquisitions. To the contrary, establishment of duopoly was the Commission's aim. The elimination of any independent competitive force was the conceded result. The compression of the national intercity bus industry into a duopoly, eliminating thereby the existence of a viable third competitive force, violates the prohibition against ''the creation of monopolies'' and rejects the Court's emphasis on ''the preservation of independent and competing motor carriers.''

While, as we shall urge in a moment, it may be time to reconsider the majority decision in *McLean* in the light of the Commission's unrelenting march to national duopoly, we believe that, on the factual determinations in the present record, the Commission's decision granting

---

* The Commission's Examiner in the present case, while quoting at length from *McLean*, changed the entire meaning of the decision by excising the last three sentences of the foregoing quotation (App. C, p. A121). Only with such deletion could the Examiner find comfort in *McLean*.

Transcon's application cannot be justified even if the majority opinion in *McLean* is still accepted as gospel. The Commission, in its application by application approach to the problem, has not made any findings of fact upon which to justify the complete disregard of established anti-trust law concepts to the end that all independent competition be excluded from the bus industry (pp. 23-26, *supra*).

Relying principally on the decision of this Court in *Seaboard Air Line R. R.* v. *United States*, 382 U. S. 154 (1965) (App. B, pp. A61-62), the Commission revealed its philosophy when it concluded (*id.* at 63-64):

> "The Commission is not bound by any criteria laid down under the Clayton Act, even where it may find that a certain merger or acquisition actually will result in reduction of competition. We may still find that other factors in the public interest outweigh and override the reduction of competition in a given instance. The examiner, in our opinion, did not err in failing to apply in these proceedings those criteria set forth under the Clayton Act."

The *Seaboard* decision does not authorize the total concentration of a national industry to the exclusion of any independent competition. *Seaboard* was based on the Commission's findings (totally absent here) that "the merged lines caried only a small part of the total traffic in the area involved; that ample rail competition would remain therein * * *" (382 U. S. at p. 155). Upon such facts, this Court reversed the determination of the District Court which would have required the Commission to resort to the usual statistical analysis of the relevant product and geographic markets (382 U. S. at 156). *Seaboard* does not

teach the Commission to ignore the criteria of the Clayton Act, for it cited (*ibid.*) *Minneapolis & St. Louis Ry.* v. *United States,* 361 U. S. 173, 186 (1959) and *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87 (1944), as requiring the Commission to "estimate the scope and appraise the effects of the curtailment of competition . . ." flowing from proposed acquisitions (*id.* at 156). This compels the Commission to examine very broadly the anti-competitive effects inherent in the creation of a national duopoly. The Commission itself in *Seaboard Air Line R. R.—Merger—Atlantic Coast Line,* 321 I.C.C. 122 (1963), quoted from *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 346 (1962) as follows (320 I.C.C. at 129):

> "[T]endencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time."

Indeed the Commission pays lip service to these decisions in its present opinion (App. B, pp. A61, 63 nn. 11-12), but fails to obey their mandate. The Commission contends that the present acquisitions will increase rather than reduce competition on the east coast (App. B, pp. A64-65). While this is a totally unsupported conclusion even for the east coast area,* it completely ignores the conceded fact

---

* The court below, as did the Commission, glosses over the fact of actual competition between Transcon and the acquired companies by pointing out that there is relatively little duplication of service. Duplication and competition are entirely different concepts. The duplication itself was substantial, taking place in the heavily travelled northeast (R. 53—Tr. 332). But the competition entirely overlooked by the Commission and the court was even more extensive. Transcon's own witnesses established that there existed hun-

(*Footnote continued on following page*)

that future competition in the industry is foreclosed by authorizing two companies to control the industry (App. H, p. A178). There can be no finding here that ample bus competition remains or that only a small part of the total national traffic is carried by the duopolists or either of them (*ibid.*).

The duopoly created by the Commission is tantamount to monopoly. As Clair Wilcox has pointed out in *Competition and Monopoly in American Industry*, 11 (T.N.E.C. Monograph No. 21, 1940), duopoly and monopoly are essentially the same. The author concedes that, theoretically, a second source would afford a buyer an alternative supply (*ibid.*):

> "But it is unlikely to afford him any real alternative in quality, service, price or terms of sale. If the two sellers are of equal strength, each must shape his policy with an eye to the action of the other. If they are of unequal strength, the weaker will usually follow the lead of the stronger. In either case, an understanding governing production and price is readily to be attained. In their essential character and in their ultimate effects, duopoly and monopoly are the same."

Subsequent action by the Commission demonstrates only too clearly its substitution of the cartel for competition.

(*Footnote continued from previous page*)

dreds of miles of route competition between Transcon and the acquired companies; each was part of a separate route system from Dallas to the northeast. Indeed, the pooled operations involving the companies acquired by Transcon carried more passengers through the southern New Orleans gateway than Transcon carried over its own lines through the St. Louis gateway (R. 53—Tr. 84, 384. Also see Tr. 267-71, 444, 928, 936 and 1072-3). Such competition has been eliminated by the Commission's order.

In the case at bar, the Commission justified its approval of Transcon's acquisition so that Transcon might be a more formidable competitor of the "giant" Greyhound. But five months later, in the *Greyhound Corporation-Control-Texas, New Mexico & Oklahoma Coaches, Inc.* (101 M.C.C. 655), the Commission, applying precisely the same rationale, permitted Greyhound to acquire an independent company operating in the southwest. The theory this time was that Greyhound needed to make the acquisition in order to compete more effectively with Transcon "which now has a majority of route mileage in Texas" (*id.* at 671-72).*

And so the vicious circle is complete. In its piece-by-piece consideration of each acquisition, the Commission justified Transcon's aggrandizement on the ground that Greyhound needed competition. Then it justified additional Greyhound acquisitions on the same rationale. Such reasoning will justify the devouring of the few remaining isolated independents by one system or the other in order to maintain the balance between the giants created and nurtured by the Commission. As a natural consequence, the existence of any effective third competing force has been completely destroyed, entry into the business is barred, and the antitrust policy of the United States has been totally thwarted.

---

* In order to refute Transcon's argument that Greyhound dominates the bus industry, the Commission said Greyhound was an old system but that "the Continental system has grown at a faster rate recently" (101 M.C.C. at 673 n. 12). Between 1952 and 1962 Greyhound's route miles had increased only 5% while Transcon's had almost doubled (*ibid.*). Including the present acquisitions, they have increased 135% since 1952. Over the same periods, the number of regular route miles of intercity bus operation *has declined* (Interstate Commerce Commission, *Annual Reports*, 1952-1964).

Even the Justice Department recognizes this problem now. It vigorously opposed Greyhound's application for control, *supra*, on the ground that the acquisition:

> "would seriously reduce the bus routes that could be joined together in competitive through services or a third system, and thus make these possibilities for additional competition less feasible" (Justice Department Petition for Reconsideration, April 14, 1967, p. 5).

After noting the Commission's approval of the acquisitions under attack in the present case, the petition also states (p. 2):

> "If the Commission's actions in the pending cases permit Greyhound's acquisitions, the effect will be to further the aggregation of all bus lines into two systems, and to end the possibility of a viable competition evolving from the healthy group of independent carriers . . ."

The present decision has brought about in the bus industry the very pattern which the dissenting opinion in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 94-5, forecast:

> "But if the Commission is allowed to take the other view, a pattern of consolidation will have been approved which will allow the cartel rather than the competitive system to dominate this field. History shows that it is next to impossible to turn back the clock once such a trend gets under way." (footnote omitted).*

---

* The perspicacity of this observation and that of Attorney General Olney in 1892 (See Jaffe, *Judicial Control of Administrative Action*, 12 n. 6 (1965) is confirmed by the duopoly and Senator Hart's comments recorded in 37 *Antitrust Law Journal*, 275, 279 (1968).

As a consequence it may be time to consider whether this Court should lay down additional guide lines to govern the Commission's actions in acquisition proceedings. Professor Fulda, in *Competition In The Regulated Industries—Transportation* (1961), after reviewing the Commission's somewhat erratic course toward concentration in the motor carrier industry, concluded (*id.* at 160-1):

> "The Commission has been charged with discrimination against small carriers and fostering a 'dramatic increase' in trucking concentration. This overlooks the fact that the Commission has no explicit or unqualified mandate to prevent concentration. *The real quarrel of the critics,* as Professor Jaffe suggested, *is therefore* with Congress for failing to provide for such specific mandate or *with the Supreme Court for failing to resolve the conflict between Section 7 of the Clayton Act and Section 5 of the Interstate Commerce Act along the lines suggested by the dissent in the McLean Trucking Co.* case." (emphasis added).

Should this Court, in the light of present developments, draw closer to the view of the dissent in *McLean,* it would follow *a fortiori,* that the Commission's action in the present case cannot be sustained. This record shows no necessity or need requiring "the antitrust laws * * * to give way" (321 U. S. at p. 94).

The report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) in its section dealing with "Mergers" in "Regulated Industries" espoused the dissent in *McLean,* stating (at p. 270):

> "Where Congress has been silent, the basic policy of our antitrust laws requires the Court's conclusion that competition, at least where all other considerations in-

volved are equal, is in the 'public interest.' In all instances, the courts, in reviewing agency discretion, should recognize that 'administrative authority to grant exemptions from the antitrust laws should be closely confined to those (instances) where the * * * (regulatory) need is clear.' "

Neither the record nor the findings of the Commission show any clear need for the creation of a national duopoly in the bus industry.

C. Procedurally The Commission's Decision Cannot Stand—The Express Failure To Consider The General Effect Of The Acquisitions Upon The Industry Requires Reversal.

The Examiner and the Commission failed to consider the desirability of maintaining the Queen, Safeway and Virginia systems as a viable nucleus of independent companies (pp. 23-26, *supra*). They also failed to examine whether the public interest required such an alternative to the exclusive duopoly presented by the Transcon application (App. H, p. A178). They refused to engage in any economic study on this score and refused to consider appellants' tendered evidence on this subject (pp. 21-23, *supra*).

This failure of the Examiner and the Commission to consider anything but the bare bones of the specific acquisition applications before them would appear alone sufficient to lead to a vacating of the Commission's order. In *Baltimore & O. R. R.* v. *United States,* 386 U. S. 372 (1967), the Commission's approval of the Penn Central merger was upset by reason of the Commission's failure to determine the ultimate fate of three small independent roads affected by that merger. While not dealt with specifically in the opinion of the Court, the concurring opinion of Mr. Justice Brennan

indicates plainly that the Commission's action in the *Penn Central* case was motivated by the same philosophy which caused the Commission to shut its mind in the present case to appellant's tendered evidence and contentions relating to the desirability of maintaining in the industry an adequate third competitive force. Thus, Mr. Justice Brennan pointed out (386 U. S. at 412):

> "The Commission's duty to consider all the relevant effects of a consolidation before authorizing it extends, moveover, not only to whether an inclusion necessary to make the proposed transaction consistent with the public interest is in fact attainable, *but also to whether such an inclusion, even though attainable, might set in motion events which could put the basic transaction proposed in a less favorable light.*"

In the case at bar the preservation of a viable third competitive force was a factor which might well place the proposed transaction in a less favorable light.

In *Baltimore & Ohio,* Mr. Justice Brennan dwelt at substantial length upon the power and the duty of the Commission "to develop complete records with respect to the public interest in particular merger proceedings" (386 U. S. at 427). Quoting from a Congressional Report dealing with the Commision, he said the Commission (*id.* at 429-30):

> " 'is not intended to be a passive arbiter but the 'guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected.' * * * Rather, the agency's duty is to weigh alternatives and make its choice according to its judgment how best to achieve and advance the goals of the National Transportation Policy." (citations omitted).

In language entirely apposite to the Commission's failure to consider appellant's tendered evidence and refusal

to assign an economic expert to testify in the proceeding is Mr. Justice Brennan's further condemnation of the Commission's action in the *Penn Central* merger (*id.* at 431):

> "Although a case-by-case adjudication may offer advantages in flexibility and continual exposure to concrete situations, 'the disadvantages of developing policy through a sequence of limited cases are both numerous and impressive.' H. R. Doc. No. 678, *supra*, p. 81. A significant disadvantage is that individual proceedings 'seldom if ever produce sufficiently comprehensive records for the adequate solution of questions of major importance.' *Id.*, at 82. Obviously, without all the relevant facts, the chance of a satisfactory disposition is diminished. Although the ICC has tools to assemble complete factual records, it employed virtually none of them in these highly interrelated proceedings * * *."* (citations omitted)

The Commission's simplistic approach required only the almost mechanical determination of whether the financial terms of the proposed acquisition were reasonable. This neat approach to the problem excludes all consideration of the future desirability of a duopoly, excludes all consideration of accommodation between the antitrust policy and the simple economies of a merger, and has lead, in essence, to the Commission approval of substantially every acquisition merger requested by the established duopolists (App. E, pp. A147-63).

So without any consideration of the basic issues, the Commission has eliminated the only remaining effective competitive group of bus systems. It has made it impossible

---

* See also Fulda *Recent Transportation Mergers*, 48 Minn. L. R., 723, 727-8 (1963).

for appellant, or anyone else, to present an application to the Commission for the acquisition of these companies and the subsequent combination of such a nucleus with the few other remaining independent companies to form at least one effective competitive force to challenge the Greyhound-Transcontinental duopoly.

SECOND—The Commission, Prior To Granting Transcon's Application Under Section 5(2) Of The Interstate Commerce Act, Should Have But Did Not Consider Preapproval Violations Of The Clayton Act By Transcon; The Commission Improperly Aborted Its Proceeding Under Section 11 Of The Clayton Act.

When it became apparent that the Commission in the Section 5 proceeding refused to consider the effects of Transcon's acquisitions of stock in Safeway, Virginia, Queen and certain other affiliated companies, consummated prior to obtaining the Commission's approval, appellant invoked Section 11 of the Clayton Act.

The partial disclosure (R. 53—Exh. 168) of the depositary receipt acquisitions throwing grave doubt on the Scheitel-Love-Moore testimony (pp. 26-31, *supra*) was, in appellant's view, the final fact necessary to tie together in a premeditated plan Transcon's activities locking up, to the exclusion of all others, the independent nucleus of bus companies in which appellant was interested.

So, on August 20, 1965, appellant suggested to the Commission (R. 41-48) that Section 7 of the Clayton Act had been violated and that, accordingly, the Commission was

under duty to issue a complaint by virtue of Section 11(a) and (b) of the Act, 15 U.S.C. § 21(a), (b) which provides:

> "(a) That authority to enforce compliance with sections 2, 3, 7 and 8 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended . . ."
>
> * * *
>
> "(b) Whenever the Commission . . . vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7 and 8 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges . . ."*

After a lapse of over three months, the Commission on November 30, 1965, advised appellant that it should file its own complaint with the Commission if it believed that there had been a violation of Section 7 (R. 53—Letter from ICC dated Nov. 30, 1965). This was hardly a discharge by the Commission of its duty under Section 11. But rather than dispute with the Commission appellant on December 8, 1965 transmitted an extensive verified complaint (in letter form) to the Commission setting forth the claim that sixteen named respondents including Transcon had violated Section 7 of the Clayton Act (R. 41-42).

The charges were, briefly, that prior to obtaining any consent from the Commission under Interstate Commerce

---

* Provision is thereafter made for appearance, answer to the complaint and hearings. If, upon such hearing, the Commission "shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing * * * and shall issue a cease and desist order as well as an order for divestiture." Clayton Act § 11(b), 15 U.S.C. § 21(b).

Act Section 5 Transcon, pursuant to a plan to create a duopoly and exclude all others including appellant from the industry, had (a) acquired 21% of the stock of Safeway (*id.* at 2); (b) had acquired by purchase of depositary receipts substantial stock interests in Virginia Stages (4%), Queen (10%) and a related corporation, General Realty and Insurance Company (GRIC) (16%) (*id.* at 4), which owned bus terminals and also one-third of Georgia-Florida Coaches, Inc., another interstate bus carrier (*id.* at 2); (c) had acquired control of Queen, Virginia Stages and GRIC by virtue of requiring the deposit of all of the shares of the stock of these companies in exchange for irrevocable depositary receipts (*id.* at 3); and (d) had acquired, through the acquisition of Queen, Eastern Carolina Corporation, an intrastate carrier (*id.* at 5).* There were further detailed charges concerning the method pursued by Transcon to consummate its plan, including the charge that Transcon had endeavored to conceal its acquisitions of Queen and GRIC depositary receipts by misrepresentations to the Commission and the United States government (*id.* at 8).

Upon receipt of appellant's letter, the Commission issued it as a complaint under Section 11 and assigned to it Docket No. MC-C-4969 (R. 41-73). It served copies of appellant's letter-complaint on the sixteen defendants named therein and on the Attorney General as required by Section 11 of

---

* This acquisition of Eastern Carolina was a condition to the acquisition of Queen (pp. 12-13, *supra*). Transcon, however, at no time made the acquisition of Eastern Carolina a part of its Section 5 proceeding as it was required to do. *Pacific Greyhound Lines-Control & Merger-Geronimo Lines,* 56 M.C.C. 415, 433 (1950), but in Transcon's 1966 Annual Report (p. 12) it confirms its purchase of Eastern Carolina.

the Clayton Act (*ibid.*). On January 24, 1966, appellant requested that the Section 11 complaint be amended to include specifically Transcon's acquisition without Commission approval of the GRIC stock and also of the capital stock of Water Street Equity Corporation, which controlled a substantial amount of the stock of Virginia Stages (R. 53—Supplemental Complaint, Jan. 24, 1966). The Commission accepted this amendment on February 17, 1966 and issued it as as a supplemental complaint in the Section 11 proceeding. The named respondents including Transcon filed answers (R. 53).

At this point, however, the Commission's activities under Section 11 of the Clayton Act came to a halt. No hearings were ever held and on May 18, 1966, the Commission on its own motion dismissed the complaint without ever passing on the merits, solely on the ground that it "referred to facts of record and matters at issue" in Transcon's applications brought under Section 5(2) of the Interstate Commerce Act (R. 41-74). But in the Section 5(2) proceedings, the Commission ignored these issues and granted Transcon's application on the theory that it was "not bound by any criteria laid down under the Clayton Act" (App. B, p. A63).

The Commission was empowered to issue a Section 11 complaint only if it had "reason to believe that any person is violating or has violated any of the provisions" of certain Sections of the Clayton Act [15 U.S.C. Section 21(b)]. Having issued the complaint it was required to hold hearings and then reach a decision on the merits. (*ibid.*) The Commission having done neither, never decided whether or not Transcon had violated the Clayton Act and, accordingly, it never determined in the Section 5(2) decision

whether, in the light of the violation of the Clayton Act, the granting of Transcon's application was in the public interest. Such Clayton Act violation should have presented as potent a reason for denying the Transcon application under Section 5(2) as the preapproval violation of Section 5(4) of the Interstate Commerce Act presented for denying the application in *Gilbertville Trucking Company* v. *United States,* 371 U. S. 115 (1962). (See p. 75, *infra*).

Many facts and matters were presented in the Section 11 complaint which were not encompassed at all in the Section 5(2) proceeding. But if all facts and matters had been identical, it is now beyond question that the legal principles applicable in a Clayton Act Section 11 proceeding differ substantially from the principles and criteria to be applied in resolving a Section 5 application. Consequently, a preapproval violation of Section 7 of the Clayton Act might well have been found even though as a *de novo* proposition in the Section 5(2) proceeding the Commission might have been willing to grant prospective immunity.

This conclusion would seem to follow, *a fortiori,* from the decision in *Denver R.G.W.R. Co.* v. *United States,* 387 U. S. 485, 501-2. This Court there found error in the Commission's refusal to decide whether Section 7 of the Clayton Act had been violated in a proceeding brought under 20(a) of the Interstate Commerce Act. The Commission had urged that its postponement of this question was appropriate as a Section 5 control proceeding in which anticompetitive effects would be considered would have to be brought before Greyhound could establish its control over REA. The majority of the Court disagreed. The Court

held that permission to issue stock under 20(a) could be granted only if the acquisition contemplated thereby was not suspect under Section 7 of the Clayton Act. The Court discussed the differences between the Clayton Act standards and a Section 5 proceeding thus (387 U. S. at 501-2):

> "But the duty under § 5, as we point out above, arises only after the threshold fact of control is established. No such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. A company need not acquire control of another company in order to violate the Clayton Act. See, *e.g., United States* v. *du Pont & Co.,* 353 U. S. 586; *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 152 F. Supp. 387 (D.C.S.D.N.Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958). Section 7 proscribes acquisition of 'any part' of a company's stock where the effect 'may be substantially to lessen competition, or to tend to create a monopoly.' Moreover, the purpose of § 5 is significantly different from that of the Clayton Act. * * * the Clayton Act is prohibitive, and imposes a positive obligation upon the ICC to act."

The acquisition of 21% of the stock of Safeway, of some 10% of the Queen stock and 4% of the Virginia stock through the acquisition of the depositary receipts, added to locking up all of the Queen and Virginia stock by requiring irrevocable deposit thereof (p. 14, *supra*) was ample basis for finding a violation of Section 7 of the Clayton Act even though the Commission in the Section 5 application did not consider the percentages sufficient to establish control.*

---

* The Commission has, in the past, found the acquisition of as little as 6.2% of the outstanding common stock of a company to

(*Footnote continued on following page*)

If violation of Section 7 had been found there is at least some doubt whether or not the Commission had the power in a Section 5 proceeding to grant approval to such an acquisition. In *Minneapolis & St. Louis Ry.* v. *United States,* 361 U. S. 173 (1959), a complaining intervenor made the specific argument that the Interstate Commerce Commission had no power, in an acquisition proceeding, to immunize a preapproval violation of the antitrust laws. This Court left the question open for it found that there had been no preapproval violation of Section 11 of the Clayton Act. The Court said (p. 191):

> "Minneapolis contends that § 5(11) operates only *in futuro* and confers 'no authority to purge the taint of a transaction illegal at the time it was brought to the Commission.' Whether there is merit in that contention, as a legal abstraction, we need not decide, for here the existing contractual arrangements . . . look entirely to the future."*

Irrespective of whether the Commission may ultimately be held to have the power in a Section 5 proceeding to condone preapproval violations of the antitrust law, its failure in the present case to pursue its Section 11 complaint to a conclusion is plainly erroneous. It is one thing to condone

---

(*Footnote continued from previous page*)

violate both Section 7 of the Clayton Act and Section 5(4) of the Interstate Commerce Act. *Chesapeake & Ohio Ry.—Purchase,* 271 I.C.C. 5, 17 (1948); *I.C.C.* v. *Baltimore & Ohio R.,* 160 I.C.C. 785 (1930); Fulda, *Competition in the Regulated Industries: Transportation,* 58 (1961).

* *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966), still seems to leave the matter unsettled although it held that an act performed prior to statutorily required Commission approval was vulnerable in a private treble damage action regardless of its immunizable nature.

a violation of the law found to exist; it is quite another for the Commission to shut its eyes to violations charged and reach a decision without ever determining whether a pre-approval violation had or had not taken place. The Section 11 complaint should have been disposed of on the merits before the Interstate Commerce Act Section 5(2) application was adjudicated.

THIRD—The Court Below Should Have Granted Relief Addressed To The False Testimony and Deliberate Concealment Of The Facts With Which Transcon Supported Its Application In The Interstate Commerce Commission.

The court below should have, but did not, apply the principles of *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238 (1944), to grant relief addressed to the use of false testimony and concealment of facts by Transcon in presenting its application. In *Hazel-Atlas* the officials of the Hartford Company, while an application for patent was pending, had written an article describing the patented device as one of two "revolutionary devices" with which labor skilled in bottle blowing had been confronted. The Hartford officers procured the president of a glass workers' union to sign the article. It was published under his name and subsequently made a part of the record in support of the application pending in the Patent Office. The patent having been granted, litigation to enforce the patent ensued. The spurious article formed part of the file wrapper history introduced in evidence in the District Court. The bill having been dismissed in the District Court on the ground of no infringement, Hartford appealed.

The attorneys for Hartford, one of whom had played a part in preparing the spurious article for publication, directed the Court's attention to "the article by Mr. William Clarke, former president of the Glass Workers' Union." The Court of Appeals, in its opinion upholding the patent and holding it infringed, quoted from the article to show that labor organizations of practical workmen recognized the new and differentiating elements of the patent. Long subsequently, the spurious nature of the article was discovered and Hazel-Atlas brought a bill of review to vacate the judgment in the Court of Appeals. That court, while finding the facts as above stated, refused relief on grounds that the spurious publication was not the primary basis for the Court's decision upholding the patent, that the fraud was not newly discovered, and that the Court lacked power to set aside the decree of the District Court because of the expiration of the court term in which the original decision was rendered. This Court reversed in an opinion here apposite (322 U. S. at 246-47):

> "We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. • • • Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. • • •

> "The Circuit Court also rested denial of relief upon the conclusion that the Clarke article was not 'basic' to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers throught the article material. * * * They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise."

This salutary language applied to a spurious article introduced in the Patent Office and referred to in a brief filed in the Court of Appeals. It applies, *a fortiori,* to the sorry record here disclosed. We are dealing with a concerted plan by three witnesses, the three principal officers of the corporations involved in a transaction for which Commission approval was sought to give false and misleading testimony; testimony known by Transcon's attorney to be false and misleading; testimony cited by Transcon and relied on by the Commission to support its conclusion that there had been no partial consummation of the Queen stock acquisition prior to Commission consent. Transcon's attorney emphasized the deceit by nondisclosure of facts known to him and active concealment of the truth in briefs and other arguments (pp. 26-31, *supra*). The truth was not disclosed to the District Court when Transcon succeeded in vacating a temporary restraining order against consummation of the challenged acquisitions. It was not until after the acquisitions had been consummated and prior to the

final argument in the court below that the appellees, apparently through some belated investigation by Commission's attorney brought at least some of the facts to light.*

The elements of fraud and deceit found in *Hazel-Atlas* are compounded here. The extraordinary view of the court below that this testimony was not really very false because the record shows only the purchase of depositary receipts with Transcon's funds by Transcon's officers for a Transcon subsidiary and not an agreement to do so (App. A, p. A15), constitutes an almost unbelievable surrender to Transcon's Alice-In-Wonderland argument. It means, for example, that Love, the president of Queen, who had just negotiated with Goff, Scheitel and Moore for the acquisition of Queen by Transcon, just happened to place his depositary receipts in the hands of brokers, who just happened to find for these unknown securities a buyer, which just happened to be a subsidiary of Transcon and that the catalysts for the sale just happened to be Transcon's own funds and the very officers of Transcon who had personally theretofore negotiated the basic acquisition with Love.

Whether or not this fairyland approach to the record is accepted is not material. However the challenged evidence may be read, the testimony of the three principal witnesses was concededly false.** The executives of Transcon

---

* The *ex parte* disclosure then made in appellee's briefs (pp. 15, 30-31, *supra*) leave many questions unanswered. Only the production of witnesses with adequate examination and cross examination will unearth the whole truth. The court below was requested to hold hearings for this purpose but declined (R. 67—150-51).

** While only Scheitel's testimony has been conceded to be unquestionably false (App. F, p. A166), this concession, together with the admissions and facts of record, of necessity taints the other testimony as well.

and Queen and Transcon's attorney believed it beneficial to prosecution of Transcon's application in the Interstate Commerce Commission to have such false testimony in the record. Under these circumstances, the principles established by this Court in *Hazel-Atlas, supra,* are completely applicable. This Court there rejected the contention that the spurious article may not have influenced the Court of Appeals materially and further that the contents of the article were true. This Court stated that having used the article the officers and lawyers for Hartford "are in no position now to dispute its effectiveness. * * * Truth needs no disguise" (322 U. S. at 247).

At the time when the false testimony was given, the stakes were high. The acquisition of the Queen stock, as well as the application to the Interstate Commerce Commission for approval thereof, were conditioned upon obtaining an Internal Revenue Service ruling that the transaction would have no tax consequences for the Queen stockholders (pp. 11-12, *supra*). The payment of any cash by Transcon to Queen's stockholders, if held to be connected directly or indirectly with the acquisition, would have forfeited its tax free status, and so killed the acquisition (pp. 12-13, *supra*).

Transcon's officials and attorneys, furthermore, were undoubtedly acquainted with decisions by the Commission that partial consummation of a transaction prior to Commission approval would constitute a violation of Section 5(4)*

---

* The transaction to be approved by the Commission in a Section 5 proceeding is the entire transaction, including all of its different elements. *Texas & N. O. R. Co.* v. *Brotherhood of Railroad Train-*

(*Footnote continued on following page*)

and might lead to a denial of an application, particularly where the application for approval lacked full disclosure.**

So nondisclosure of the cash purchase of depositary receipts appeared essential to insure a favorable decision permitting Transcon's huge acquisitions. Transcon's officers and counsel decided that perjured testimony was worth the risk. Under these circumstances, as in the *Hazel-Atlas* case, Transcon is in no position now to claim that the testimony was not effective to produce whatever result Transcon intended by it.

The gravity of Transcon's offense is underscored by 18 U.S.C. Section 1505, which forbade Transcon corruptly to influence the Commission or "endeavor to influence, ob-

---

(*Footnote continued from previous page*)

men, 307 F. 2d 151, 159 (5th Cir. 1962), *cert. denied*, 371 U. S. 1952 (1963); *Marcell-Purchase-Rowley*, 50 M.C.C. 699, 701 (1948). Collateral cash payments, even though not required by the contract submitted to the Commission, are, nevertheless, part of the transaction and constitute partial consummation of the acquisition for which approval is sought. *McNamara Motor Exp., Inc.-Purchase-Rainbow Exp., Inc.*, 55 M.C.C. 357, 365 (1949); *Refiners Transp. & Term. Corp.-Purchase-Petroleum*, 39 M.C.C. 662, 663 (1944); *System Tank Lines, Inc.-Purchase-Lang Transp. Corp.*, 59 M.C.C. 724, 730 (1953). So a cash acquisition of stock by means of purchasing the depositary receipts, whether a part of the contract submitted to the Commission or not, would have been considered by the Commission as a partial consummation without prior Commission approval. See cases above cited and particularly *System Tank Lines, Inc.-Purchase-Lang Transp. Corp.*, 59 M.C.C. 724, 730 (1953).

** *Watson Brothers Transp. Co.-Lease-Burnett & Feighner*, 55 M.C.C. 277 (1949); *Brown Ex.-Purchase-Jones Motor Freight Lines, Inc.*, 55 M.C.C. 127, 130 (1948); *Raymond Bros. M. Transp., Inc.-Purchase-North American*, 37 M.C.C. 431 (1941). The foregoing decisions merely follow the principles dealing with violations of Section 5(4). See *Gilbertville Trucking Co.* v. *U. S.*, 371 U. S. 115 (1962); *Lombard Bros., Inc.* v. *U. S.*, 226 F. Supp. 905, 908 (D. Conn. 1964).

struct or impede due and proper administration of law * * * by the Commission." It is a violation of this statute to endeavor to obtain agency action by lies; bribery is not the only method of corruption. *United States* v. *Polakoff*, 121 F. 2d 333, 335 (2nd Cir. 1941).

Furthermore, perjury appears to have been committed in violation of 18 U.S.C. Section 1621. The concession that the Scheitel testimony was unquestionably false (App. F, p. A166) is, for present purposes, dispositive as to Scheitel. But the concession is really broad enough also to cover Moore and Love. This is particularly true as the oath administered to the witnesses is not only to tell the truth, but to tell the whole truth, which was here most effectively concealed.

What has been said points to the flaws in the decision of the Court below. We have analyzed the Court's hypertechnical suggestion (App. A, pp. A14-18) that the testimony in question might be construed to mean that Transcon had not been party to a pre-existing agreement to buy the depositary receipts for cash. The Court's conclusion from this tenuous premise is hardly in keeping with the judicial duty imposed by *Hazel-Atlas*. According to the Court, absent direct evidence that there was a pre-existing agreement to buy depositary receipts, it was not material that Transcon had in fact bought the certificates with its own funds through its own officers in the name of one of its subsidiaries. Therefore false testimony on this point could be disregarded.

Whether or not there be adopted appellant's view that the circumstantial evidence unerringly points to the existence of an agreement by Transcon to furnish cash to such

of the Queen stockholders as required it, the fact still remains that the Scheitel-Love-Moore testimony was false. Scheitel did know who purchased the depositary receipts but in his testimony he denied it. Love most certainly knew who purchased his depositary receipts and who had made a market for them but in his testimony he denied it. Moore most certainly knew that there was an agreement by Transcon to furnish funds for the purchase of the depositary receipts but he denied it. The agreement concerning which he was asked was not any pre-existing agreement with the Queen stockholders, but any agreement. The record, as it presently stands, discloses that depositary receipts were sold through First Securities Corporation, which was placed in funds by Transcon through an arrangement with one of Transcon's officers or its attorney. This is an agreement, the existence of which Moore deliberately denied. The administrative process was corrupted by such false testimony and the failure of Transcon's counsel to purge it. This is enough to invoke *Hazel-Atlas*.

Such a conclusion is abundantly supported by *F.C.C.* v. *WOKO, Inc.*, 329 U. S. 223 (1946). There this Court reversed the Court of Appeals which, in turn, had reversed an order of the Federal Communications Commission denying an application by virtue of applicant's presentation of false testimony. This Court said (pp. 226-227):

> "It is said that in this case the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently had it known that the Pickards were the beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts

concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted."

The Court below takes the position that even if the Scheitel-Love-Moore testimony was false and misleading, it would not constitute a fraud unless the Commission was shown to have been materially misled thereby (App. A, p. A13). Such a conclusion also misreads the lesson taught by *Hazel-Atlas* as well as *WOKO*. It was there held sufficient that fraud was perpetrated. The perpetrators were held estopped to question the materiality or effectiveness of the deceit. The willingness to deceive an administrative body, as well as the courts, is sufficient to deprive the perpetrators of the deceit of administrative or judicial benefits resulting from the tainted proceeding. That the deception may have proved immaterial, unnecessary or even useless, does not save the wrongdoer from the consequences of *Hazel-Atlas* or *WOKO*.

In any event, the opinion of the court below is based upon a mistaken premise. The fact is that the Commission was misled by the false testimony. It is only that

testimony which was cited in the court below by the Commission's counsel to establish that in fact there had been no pre-existing agreement by Transcon to furnish cash to some of the stockholders as a part of the acquisition agreement (R. 54-33-39). Aside from the challenged testimony, there is no evidence in the record to sustain such a conclusion. If, as now appears, the testimony was false, then it is plain that the Commission was in fact misled. Indeed, the court below, strangely enough, was likewise misled in spite of the disclosures and concessions belatedly made by Commission's counsel just prior to the argument. The court below finds (App. A, p. A15):

> "While the I.C.C. report does not contain an explicit finding that there was no secret agreement on the part of Transcon to purchase or make a market for the deposit receipts, the evidence in the record was quite sufficient to support such a finding. Transcon and Queen officials strenuously denied that there was any such commitment, and the Commission was entitled to credit their testimony."

The only evidence in the record and the only strenuous denial by Transcon and Queen officials are the very testimony material parts of which have been conceded to be false.

The court below sustains its position by suggesting that the Interstate Commerce Commission does not claim that it was deceived (*id.* at A15-16). We believe it to be a matter of deep regret that a powerful agency charged with the protection of the public interest and the administration of important laws is so insensitive to the presentation before it of false and deceitful testimony that it failed to take action when its counsel discovers the taint. Instead

we have only the feeble lament of Commission's counsel when he first disclosed the actual facts in the court below: "In our view it certainly would have been preferable, had this information been made available at the hearing . . ." (App. F, p. A164).*

It was the duty of the court below to unearth the entire fraud by hearing if necessary—especially as the fraud reached into the court where disclosure was not made until after the temporary restraining order was vacated on representations by Transcon that the order of the Commission was valid and unassailable (R. 38). (See *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575 (1946); *American Insurance Co.* v. *Lucas*, 38 F. Supp. 926 (W. D. Mo. 1941), *app. dismissed per curiam*, 314 U. S. 575 (1941); *Consolidated Gas & Equipment Co. of America* v. *Carver*, 257 F. 2d 111 (10th Cir. 1958); *cf., Petition of Demetrios Devlas*, 31 F.R.D. 130 (S.D.N.Y. 1962); *Klapprott* v. *U. S.*, 336 U. S. 942 (1949); *FDIC* v. *Alker*, 234 F. 2d 113 (3rd Cir. 1956)).

In the alternative, the court below should have remanded with instructions for the Commission to rehear, take additional evidence, make findings and reach conclusions as to appellant's claims.* Appellant, as well as the public, is at least entitled to have all the facts fully developed at a

---

* The industry of Commission's counsel in discovering facts leading to his concession that false evidence had unquestionably been presented to the Commission is no substitute for Commission action in the light of counsel's discovery. Cf. *T. I. McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526, 536 (D.N.J. 1966); see also *Powell* v. *United States*, 300 U. S. 276, 298 (1937).

* It is for the Commission, not its counsel, to draw conclusions from the new facts. *T. I. McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526, 536 (D.N.J. 1966); see also *Powell* v. *United States*, 300 U. S. 276, 298 (1937).

hearing and to have findings of fact made thereon by the Commission. If the Commission is of the opinion, after all such facts have been developed, that perjury by two principal officers of Transcon, by the president of Queen and failure of Transcon's counsel to disclose the facts** does not disqualify Transcon from being awarded a duopoly position in the bus industry, then at least such facts and the Commission's conclusion should be spread upon the record.

In a more meticulous decision, the Commission itself pointed the way to the conclusion which it should reach on the facts as now disclosed. *Central of Georgia Control,* 307 I.C.C. 39, 43-44 (1958):

> "The Public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and observance of law."

This view has the specific approval of this Court which, in *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 128 (1962), said:

> "As already noted, § 5(4) is integral to the success of the regulatory scheme. To approve a merger in the face of a § 5(4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a *fait accompli* or avoid its jurisdiction altogether. As the Commission pointed out in *Central of Georgia,* if such practices were encouraged, 'our administration of the statute in the public interest would be seriously hindered, if not defeated.' 307 I.C.C., at 44."

** The duties of counsel in such a situation are plain (*Kingsland* v. *Darsey,* 338 U. S. 318 (1949); Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information,* 51 Iowa L. Rev. 807 (1966)).

The Department of Justice has also had its more meticulous moments. So relying upon *F.C.C.* v. *WOKO*, 329 U. S. 223, it opposed, because of appellant's lack of candor, the Federal Communications Commission, which had approved the I.T.T.—A.B.C. merger. (Brief of the United States in *United States* v. *FCC*, #21147 USCA, D. C. p. 28). The merger was then abandoned. It is astonishing that on the aggravated facts in the present record the Department has not to date adopted the same salutary position.

Violations of law, including corruption of the very administrative process itself, should not be rewarded by grant of the application prosecuted by such corruption.* The court below should have deprived Transcon of the fruits of its misconduct.

FOURTH—Appellant Has Standing to Sue.

We do not believe that appellant is required to appeal from the discussion contained in Part V of the opinion in the court below (App. A, p. A36). This appears to be gratuitous *obiter dicta*. If the court had thereby intended to hold that plaintiff had no standing to sue, then the balance of the opinion would appear to be totally ineffective. Had the court decided that there was no party plaintiff, there was obviously no case or controversy and no jurisdiction.

---

* This has been the general rule. *F.C.C.* v. *WOKO*, 329 U. S. 223; *Lorain Journal Co.* v. *F.C.C.*, 351 F. 2d 824, 830 (D. C. Cir. 1965); *Robinson* v. *F.C.C.*, 334 F. 2d 534 (D. C. Cir.), *cert. denied*, 379 U. S. 843 (1964); *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 320 F. 2d 795 (D. C. Cir. 1963).

Out of an abundance of caution, however, we indicate briefly the basis for appellant's standing.

Appellant had a tangible concrete expectancy in acquiring the controlling stock of Queen and affiliated companies (pp. 9-11, *supra*). Transcon upon becoming aware of appellant's proposed acquisition, took steps to block it and to acquire this property itself (pp. 11-15, *supra*). Appellant has charged that such acquisition was a part of Transcon's plan to create a total duopoly in the bus business by acquiring the Safeway and Virginia bus systems more or less simultaneously with the acquisition of Queen and its subsidiaries, all for the general purpose of excluding any third competitive force from the bus industry and, specifically, excluding appellant therefrom. Transcon's plan was implemented by filing its applications under Sections 5 and 20(a) of the Interstate Commerce Act in order to obtain the Commission's consent to the transaction and immunity from the antitrust laws. These proceedings, to which appellant had been admitted as a party, were prosecuted by Transcon corruptly with false testimony.

The Commission's action granting Transcon's applications under Section 5 and 20(a) achieved Transcon's aim, excluded appellant from the bus industry and purported to immunize the challenged acquisitions from the ambit of the antitrust laws.

Upon such facts appellant has standing to appeal from the Commission's orders as a "party in interest" under Interstate Commerce Act § 205(g), 49 U.S.C. 305(g)* and likewise as a person "suffering legal wrong because of any

---

* The reviewed provisions contained in 28 U.S.C. §§ 2321-2325 contain similar language. See, especially, Section 2323.

agency action, or adversely affected or aggrieved by such action" Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a).*

Appellant was a potential competitor of Transcon. As such, appellant has standing to pursue its remedies exactly as would a competitor. *South Carolina Council of Milk Producers, Inc.* v. *Newton,* 360 F. 2d 414, 417-18 (4th Cir. 1966); *North Texas Producers Association* v. *Young,* 308 F. 2d 235) (5th Cir. 1962), *cert. denied,* 372 U. S. 929 (1963); *Utah Gas Pipelines Corp.* v. *El Paso Natural Gas Co.,* 233 F. Supp. 955, 964 (D. Utah 1964); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.,* 184 F. Supp. 440, 443 (E. D. Pa. 1960), *aff'd* 297 F. 2d 199 (3rd Cir. 1961), *cert. denied,* 369 U. S. 839 (1962).** Unquestionably, a competitor which has been adversely affected by an order of an administrative agency has standing to seek judicial review (*American Trucking Assns.* v. *United States,* 364 U. S. 1, 17-18 (1960); *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77 (1958); *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940); *The Chicago Junction Case,* 264 U. S. 258 (1924)). And a recent decision according standing to the listening public to contest the renewal of a broadcast license, has eliminated the need for economic injury (*Office of Communication* v. *FCC,* 359 F. 2d 994, 1000-06 (D. C. Cir. 1966); see also Comment, "Standing of Television

---

* The foregoing appeal provisions in the Motor Carrier Act and in the Administrative Procedure Act appear to achieve indentical results. See *American Trucking Assns.* v. *United States,* 364 U. S. 1, 18 (1960).

** See also *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158 (1964); *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651 (1964), where this Court stressed the elimination of potential competition as an important factor under Clayton Act § 7.

Viewers", 66 Colum. L. Rev. 1511 (1966); Note, "Competitors' Standing to Challenge Administrative Action Under the APA", 104 U. Pa. L. Rev. 843 (1956)).

In *FCC* v. *Sanders Bros. Radio Station, supra,* the Commission had argued that "economic injury to a competitor is not a ground for refusing a broadcasting license and that, since this is so, the respondent was not a person aggrieved or whose interests were adversely affected by the Commission's action . . ." (309 U. S. at 472-73). Construing the Federal Communications Act (47 U.S.C. § 402(b)(6) [at the time of decision § 402(b)(2)]), which sets forth the same criteria for standing to obtain review as are applicable here, this Court rejected the argument. It was held that where a competitor fears financial injury as a result of administrative action issuing a license to another such competitor, he has sufficient standing to prosecute an appeal.

According to 3 Davis Administrative Law Treatise (p. 255):

> "The Sanders doctrine* has been carried over into the ICC field."

As Transcon has received Commission approval to acquire the Queen bus system in the acquisition of which appellant had a tangible contractual expectancy the *Sanders* doctrine is plainly applicable. But appellant's rights under *Sanders,* extend to attacking the Virginia and Safe-

---

* Cf. "Standing of Television Viewers", 66 Colum. L. Rev. 1511 at p. 1516, n. 35, in which the author seems to conclude that the statutory scheme for review of I.C.C. orders is more liberal *qua* standing to sue than that in the Federal Communications Act. If so, plaintiff's standing to sue here follows as an *a fortiori* proposition from *Sanders.*

way acquisitions as well for Commission action approving those and the Queen acquisition by Transcon completed the duopoly which excluded appellant from the bus industry entirely.

The recent decision in *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967), appears to indicate a trend toward liberality in according standing to be heard in courts on issues such as those involved in the present litigation. Such trend, as one author suggested, may be due to an increasing distrust of certain of the agencies on the ground that these agencies have in fact on many occasions failed to represent the public interest (*Jaffe, Judicial Control of Administrative Action,* 521 (1965)). So here, if plaintiff is not accorded standing, there is no one to bring before the Court the question of whether the creation of a nationwide duopoly in the bus industry is consistent with the aims and purposes of the Interstate Commerce Act.

W. R. Grace & Co. v. *CAB,* 154 F. 2d 271 (2d Cir. 1946), a case involving similar issues to those herein in the air carrier industry, commented on the question of standing to review administrative orders and decisions as follows (154 F. 2d at 286-87):

> "With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large. Accordingly, since this is not mere private litigation, overly nice scrutiny of the pleadings and undue stress on alleged estoppels have no place here.
>
> • • •
>
> "The unmistakable fact is that, of recent years, there has been a steady development in Supreme Court deci-

> sions of the doctrine that those seeking review of the orders of administrative agencies, under review provisions like § 1006 of this Act, 49 U.S.C.A. § 646, are primarily vindicating the public, not a private, interest. It is our duty to follow the lines laid down by that Court, and we have done so here according to our lights.". (citations omitted)

The very fact that this Court has not heretofore been presented with a case involving acquisitions in the intercity bus industry amply demonstrates that the duopolists Transcon and Greyhound, with the cooperation of the Interstate Commerce Commission, have been able to accommodate each other in the achievement of their mutual aims. This is particularly significant in the light of the hundreds of acquisitions which have led up to the final duopoly (App. E, *infra*).

The necessity for according appellant standing is here emphasized by Transcon's prosecution of its applications with the misleading and deceitful testimony to which we have above referred (pp. 26-38, *supra*). The Commission never decided whether or not this evidence was false (although its counsel has now so conceded) and obviously never passed upon the effect of such false testimony in judging the fitness of defendant Transcon to become a duopolist in the bus industry; the Commission appeared more interested in sweeping the whole charge under the carpet. Standing should plainly be accorded to someone to insist that the administrative record be purged of fraud.

Appellant at least has raised its voice in the administrative wilderness. The voice should be heard.

The reference by the court below (Ap. A 38), to a release given by appellant as a result of the settlement of a contract action against certain Queen stockholders is wholly beside the point. The release in no way ran to, or released, the Interstate Commerce Commission or the United States which are the only parties defendant here. Transcon's voluntary intervention waived whatever benefit it may claim from the release. Moreover, even as to Transcon the release did not apply to a review of Commission decision in Transcon's favor or did not cover the consequences of the false testimony which was not unearthed until long after the release was given. Indeed appellant's claim in the court below and here is that the release to Transcon, a non-party in the Carolina action, was fraudulently obtained by virtue of appellant's reliance upon the false testimony of Transcon's officers in the Interstate Commerce Commission proceeding. If such release is claimed to stand in the way of the present action, then the court below should have acceded to appellant's request for hearings to determine the validity of the release. The court below is entirely mistaken in its view that because the release was obtained as a part of a settlement of a North Carolina contract action the release may only be attacked there. A release is nothing but a contract and may be construed, reformed or avoided by any court having jurisdiction of the parties. *Fox Midwest Theatres* v. *Means,* 221 F. 2d 173 (8th Cir. 1955); *Houston* v. *Trower,* 297 Fed. 558 (8th Cir. 1924); *Carter* v. *Twentieth Century-Fox Film Corporation,* 127 F. Supp. 675 (W. D. Mo. 1955); *Mayle* v. *Griss,* 169 F. Supp. 58 (W. D. Pa. 1958).

It goes without saying that a release obtained as part of a conspiracy to violate the antitrust laws* as well as one obtained fraudulently** becomes unenforceable in any proceeding in which its invalidity is established.

Conclusion

Probable jurisdiction should be noted so that the far reaching questions relating to the accommodation of the antitrust laws with the Interstate Commerce Act and the integrity of the administrative process may be resolved.

Respectfully submitted,

FREDERICK W. P. LORENZEN
200 Park Avenue
New York, New York 10017
Attorney for Appellant

WILLIAM R. BURT
Of Counsel

Dated: November 19, 1968

---

* *Carter* v. *Twentieth Century-Fox Film Corp.*, 127 F. Supp. 675 (W. D. Mo. 1955); *Fox Midwest Theatres* v. *Means*, 221 F. 2d 173 (8th Cir. 1955); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S.D.N.Y. 1941); *Radio Corp.* v. *Raytheon Co.*, 296 U. S. 459 (1935).

** *Chandler* v. *Atlas General Industries*, 215 F. Supp. 617 (D. Mass. 1963); *Neeff.* v. *Emery Transportation Co.*, 284 F. 2d 432 (2d Cir. 1960). *Graham* v. *Atchison, T. & S. F. Ry. Co.*, 176 F. 2d 819 (9th Cir. 1949); *Westmoreland Asbestos Co* v. *Johns-Manville Corp.*, 39 F. Supp. 117 (S.D.N.Y. 1941); *Kosztelnik* v. *Bethlehem Iron Co.*, 91 Fed. 606 (E.D.N.Y. 1898); *Wagner* v. *National Life Ins. Co.*, 90 Fed. 395, 464 (6th Cir. 1898).

APPENDIX A

Interstate Investment Inc.,

Plaintiff,

v.

United States of America and

Interstate Commerce Commission,

Defendants,

and

Transcontinental Bus System, Inc.,

Intervenor-Defendant.

APPENDIX

United States District Court

S. D. New York

July 23, 1965

OPINION

Before Feinberg, Circuit Judge, and Bryan and Bonsal, District Judges.

FEINBERG, Circuit Judge:

This is an action under 28 U.S.C. § 2321-25 to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission.

The order, dated August 10, 1964, granted the applica-

(374)

APPENDIX A

INTERSTATE INVESTORS, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA and
Interstate Commerce Commission,
Defendants,

and

Transcontinental Bus System, Inc.,
Intervenor-Defendant.

No. 66 Civ. 3004.

United States District Court
S. D. New York.
July 22, 1968.

(376) OPINION

Before FEINBERG, Circuit Judge, and MURPHY and BRYAN, District Judges.

(377) FREDERICK van PELT BRYAN, District Judge:

This is an action under 28 U.S.C. §§ 2321-25 to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission.

The order dated August 10, 1966, approved the acquisition by the intervenor defendant Transcontinental Bus Lines, Inc. (Transcon), a major intercity bus carrier, of three other bus carriers in the southeastern United States,

Appendix A

Virginia Stage Lines, Inc. (Virginia), Safeway Trails, Inc. (Safeway) and Queen City Bus Lines, Inc. (Queen). The acquisition was to be effected through an exchange of stock between Transcon and the three acquired carriers. Each of the acquired carriers in turn controlled several subsidiary bus carriers.

The intercity nationwide bus industry is dominated by the Greyhound System. Transcon, though only one-fifth the size of Greyhound prior to the acquisitions under review, is its major competitor. Transcon also is a member of National Trailways Bus System (N.T.S.), a non-profit association whose membership consists of a large number of intercity bus carriers, including the three acquired companies. To foster competition with Greyhound's nationwide operations, the N.T.S. members have adopted Trailways as a common trade name, use uniform paint schemes and markings on their busses, have joint terminals, some through bus arrangements and coordinate advertising, purchasing and other essential functions.

The applications of Transcon to the I. C. C. for approval of the acquisition of Virginia, Safeway and Queen, pursuant to Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, were made to improve its competitive position in the southeastern United States where it had almost no operations. All three applications were opposed by Greyhound which did not join in this action, and as to the Queen acquisition by Interstate Investors, Inc. (Interstate), the plaintiff here.

Interstate is a Delaware corporation with its principal office in New York. The nature of its business is not clear but it is not a bus operator. Immediately prior to the time

when Transcon reached agreement with Queen, Interstate claims to have made an oral agreement to purchase Queen as a first step toward the formation of a so-called third force of bus carriers in the southeast to compete with Transcon and Greyhound. Interstate further claims that Transcon caused Queen stockholders to breach their oral understanding with Interstate and enter into the exchange of stock acquisition agreement with Transcon instead.

During the pendency of the acquisition proceedings Interstate also filed a complaint with the I. C. C. pursuant to § 11 of the Clayton Act, 15 U.S.C. § 21, alleging that Transcon's conduct prior to the I. C. C.'s approval of the acquisition amounted to an unlawful acquisition of control of Queen and constituted consummated anti-trust violations contrary to § 7 of the Clayton Act.[1] The I. C. C. dismissed this proceeding on the ground that it pertained to issues of fact and record in the acquisition proceedings.[2]

After extensive hearings on the acquisition applications the I. C. C. approved acquisition of Virginia, Safeway and Queen by Transcon and issued the order to that effect here under review. See Transcontinental Bus System, Inc.—Control—Virginia Stage Lines, 101 M.C.C. 529 (1966). In MC-F-8744, embraced in the order under review, Transcon acquired control of Virginia and Safeway, Inc.[3] In MC-F-

---

[1] MC-C-4969. The petition was filed December 10, 1965. A supplemental complaint was filed February 11, 1966.

[2] Division 3 of the I.C.C. dismissed the proceeding May 27, 1966 and denied plaintiff's petition for reconsideration on August 8, 1966.

[3] Through the acquisition of Virginia and Safeway, Transcon also acquired control of Trailways of New England (TNE); Tennessee Trailways (Tenn.T); Service Coach Lines; Carolina Scenic Stages; Coastal Stages Corporation; and The Gray Line of Charleston.

8774 the I. (378) C. C. approved Transcon's acquisition of control of Queen.[4] Authority was granted to Transcon to issue additional shares of its common stock to exchange for the stock of the acquired companies.[5] The order also dismissed Interstate's petition for reconsideration of its complaint filed pursuant to § 11 of the Clayton Act which had been previously dismissed.[6]

Interstate then commenced this action to annul and set aside the order. The prolix and confused amended complaint alleges in substance that the order of the I. C. C. was contrary to law, was unsupported by substantial evidence and was procured by fraud upon the Commission upon the part of Transcon. In addition, it contains a private anti-trust claim for relief against Transcon under the Sherman and Clayton Acts and a private claim for deceit.

The present posture of the action is complex. Interstate brought on its application for the appointment of a three-judge court under 28 U.S.C. §§ 2321-25, 2284, by an order to show cause which contained an ex parte temporary restraining order against the enforcement of the I. C. C. order under attack. At the initial hearing before the district judge sitting in motion part the application for the appointment of this three-judge court was granted and Transcon was given leave to intervene as a defendant.

---

[4] Through the Queen transaction, Transcon also acquired control of Smokey Mountain Stages; Georgia-Florida Coaches and Fort Bragg Coach Company. Additionally, Transcon acquired Queen's interest in Tenn.T, Scenic, Coastal and Gray.

[5] Finance Docket 23159 (Queen Purchase) and Finance Docket 23123 (Safeway and Virginia purchases).

[6] See note 2, supra.

However, the temporary restraining order was vacated. Interstate's motion for preliminary injunctive relief was reserved for the three-judge court. Both the I. C. C. and Transcon have answered the amended complaint.

During the course of the proceedings a number of motions have been made by the parties which include the following:

1. A motion by Interstate for preliminary injunctive relief which was reserved to the three-judge court at the initial hearing.

2. Motions by the I. C. C. and Transcon to dismiss the action on the ground that Interstate lacks standing to attack the order of the I. C. C. under review.

3. A motion by Interstate to set aside the vacation of the initial temporary restraining order and for other equitable relief on the ground that the decision was brought about by fraud upon the court on the part of Transcon.

4. Several motions by Interstate for discovery against both Transcon and the I. C. C. on a wide variety of subjects.

5. A motion by Transcon to dismiss the private antitrust and deceit claims alleged by Interstate.

The merits of the action and all pending motions were argued before this three-judge court at the same time and will be considered and decided together.

Appendix A

I.

We will deal first with Interstate's claim that the order of the I. C. C. under attack here was obtained by fraud upon the I. C. C. on the part of Transcon and that Transcon has continued such fraudulent conduct in this court. Compare Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp., 385 F.2d 533 (2d Cir. 1967); Root Refining Co. v. Universal Oil Products, Co., 169 F.2d 514 (3d Cir. 1948), cert. denied, Universal Oil Products Co. v. William Whitman Co., Inc., 335 U.S. (379) 912, 69 S.Ct. 481, 93 L.Ed. 444 (1949); Chicago Title & Trust Co. v. Fox Theatres Corp., 182 F.Supp. 18 (S.D.N.Y. 1960). In order to understand Interstate's claim of fraud, a brief review of the background of this case is necessary.

For several years Transcon, the largest member of N. T. S., has been seeking control of other N. T. S. members. At the time of the events in suit Transcon's routes were nationwide with the exception of through-routes running north and south along the Atlantic Coast. Several other N. T. S. members, including Virginia, Safeway and Queen, operated routes in this area. By agreements among these and other companies, N. T. S. was able to offer through service along the Atlantic Seaboard.

In the 1960's, Interstate and its President, Burt, became interested in welding the Trailways carriers running along the Atlantic Seaboard into a single unit. Having acquired financial backing, Burt on behalf of Interstate sought to purchase control of some of these companies. He directed

his attention primarily to two, Queen and Tamiami.[7] By early 1964 talks between Interstate and the controlling stockholders of Queen had progressed toward agreement. By March 28, 1964, Burt and Interstate claim they had a deal to purchase all of Queen's stock for approximately $8,000,000.

Transcon had long been interested in acquiring Queen and had conducted negotiations on and off with several major Queen stockholders for some years. When it learned of the possible Queen-Interstate deal, either from Queen or by letter from Interstate, Transcon immediately started negotiating in earnest.

By letter dated April 28, 1964, the President of Queen proposed an arrangement to Transcon. The suggested purchase price was about $8,000,000, approximately the same as offered by Interstate, but involved an exchange of stock. The letter also stated four conditions, the last of which was a guarantee by Transcon to buy back from some of the Queen's stockholders who wanted to cash the Transcon stock at a fixed price of $31.50 per share. Interstate focuses on this fourth proposed condition of guaranteed repurchase.

On May 21, 1964, the Queen board approved a counter-offer by Transcon which did not mention any conditions of the April 28 letter. Prior to such approval, the Queen directors implemented all of the other conditions of the letter, but no mention was made of any arrangement to

---

[7] Tamiami Trail Tours, Inc. is a member of N.T.S. principally operating in Georgia and Florida. It is not involved in the acquisitions under review.

provide Queen's stockholders with cash for their Transcon stock.

The purchase agreement provided for the exchange of 7.25 shares of Transcon common stock for each share of Queen stock.[8]

Queen stockholders were to assent to the transaction by delivering their Queen shares to a named bank as depository. The depository bank would then issue a receipt corresponding to the number of shares delivered. The stock deposited would be held by the bank pending determination of Transcon's application to the I. C. C. for approval of control. If approval were granted, the deposited stock would be transferred to Transcon and Transcon would issue shares of its common stock in return for the deposit receipts. During the period of deposit, the holders of the receipts had the voting and dividend rights to the Queen stock. Prior to consummation, Queen was not to perform any act or enter into any transactions outside its ordinary course of business and Transcon (380) was to take no action which would dilute the value of its common stock. The entire agreement, as well as Transcon's application to the I. C. C. for approval of control,[9] was conditioned on a favorable ruling from the Internal Revenue Service that the exchange of stock was tax-free.

---

[8] The agreement also involved the exchange of 7.25 shares of Transcon for each share of General Realty and Insurance Corp. (GRIC) a non-carrier owned by some of Queen's stockholders and in turn owning stock in Queen.

[9] Transcon's application for control of Virginia and Safeway was filed with the I.C.C. May 2, 1964; its application for control of Queen was filed June 5, 1964. The proceedings were consolidated by the Commission.

Appendix A

Before the I. C. C. examiner opened hearings in the fall of 1964, two significant events occurred. Interstate filed suit against Queen and the Queen stockholders in the United States District Court for the Western District of North Carolina for breach of contract, seeking money damages and not specific performance. Transcon was not a party to the action. During the same period, several Queen shareholders sold their deposit receipts for cash.[10] It is not presently disputed that the receipts ultimately came into the hands of a Transcon subsidiary.[11] Interstate alleges that these purchases were made pursuant to a secret agreement by Transcon to purchase the receipts of these Queen's stockholders who wanted cash.

When the hearings opened in Washington on September 9, 1964, Interstate questioned the Transcon witnesses in an effort to establish that such a secret agreement existed. Moore, the President of Transcon, testified in response

---

[10] The record shows that 10 Queen stockholders sold deposit receipts for 1387 shares of Queen stock prior to the opening of hearings. The sales occurred on six different dates. The sums paid ranged from $250 per share to $290 per share. After the hearings closed 617 additional shares were sold at prices ranging from $241.25 per share to $260 per share. The total of 2,004 shares represents less than 10% of the 22,264 shares of Queen outstanding. As will appear later, all of these shares were purchased by Highway Insurance of Switzerland, a corporation the I.C.C. found was presumptively controlled by Transcon. See 101 M.C.C. at 540 n. 7.

[11] According to Footnote 16 of the I.C.C. brief the purchases were all made by Messrs. Goff, General Counsel of Transcon, Scheitel, Chief Financial Officer of Transcon, Hamilton and Robinson, two other employees of Transcon.

to questions from Greyhound's counsel that Transcon did not make a market for the deposit receipts.[12]

Similar questions were asked by Interstate of Scheitel, the Vice-President of Transcon, who negotiated the contracts with Queen, Virginia and Safeway. He testified that while he had learned some of the deposit receipts had been sold, he did not know who had bought them.[13] He empha-

---

[12] The pertinent questions and answers are as follows:

"Question: Have you, or any officer, to your knowledge, of Transcontinental, Continental or its subsidiaries, agreed, by contract or by oral agreement, to supply the funds necessary to purchase the depository receipts or to make a market in these depository receipts."

"Answer: They have not." [Hearings p. 971].

"Question: And a final question: What you are saying here in this hearing is that you know nothing about the market that was made in these depository receipts?"

"Answer: I don't know that there is a market as such."

"Question: But you did seek * * *

"Answer: I understood from the testimony yesterday that there had been some trading. I mean, is this one, or is this ten trades, or one trade, or a hundred trades? How many, I have no knowledge of."

"Question: And are you also saying whether there was one or ten, you knew not how the trade or how the market was set up?"

"Answer: No, Transcontinental has no commitments. I mean, we have no part of it." [Hearings p. 973]

[13] In view of the disclosure in the I.C.C. brief, see note 11 supra, that Scheitel was one of the four Transcon officials who purchased the deposit receipts, this testimony is plainly incredible if it referred to the deposit receipts.

sized that Transcon (381) had made no commitment to provide a market for the deposit receipts.[14]

---

[14] The relevant part of Scheitel's testimony is as follows:

"Question: Has Transcontinental at any time advised people where, the shareholders where they would find a market for the depository receipts?

"Answer: Yes, sir. The depository receipts were issued on the basis that they were marketable, and if they could find a market fine.

"Question: Did Transcontinental advise them where they could find such a market?

"Answer: We told them they should go to their brokers.

"Question: Did you suggest the name of a broker?

"Answer: We suggested the possibility of Goodbody and Company that made a market in Transcontinental stock, might be interested, yes, sir.

"Question: Have you made any backup arrangement with Goodbody and Company?

"Answer: No, sir.

"Question: Is there privity between Goodbody and Company and stockholders or directors of Transcontinental?

"Answer: No, sir.

"Question: And, to your knowledge, have the trust receipts been marketed?

"Answer: I understand, I think somebody sold, yes.

"Question: Was it a part of your prior negotiations on the consideration that there would be such a market?

"Answer: No, sir. [Hearings pp. 200-01].

"Question: Well, if * * * you will concede that if this transaction is not approved by the Commission, what Goodbody and Company is making a market in is not Transcontinental stock, but in Queen City stock, for which there is no market?

"Answer: I don't know that they are making a market in Queen City stock.

"Question: But you know that some has been sold?

"Answer: I don't know who bought it.

"Question: Pardon me?

"Answer: Queen City—repeat your question, please.

"Question: You know that some has been sold?

"Answer: I was told some was sold.

"Question: You say there was no part of your prior discussions with the selling—holding shareholders that there would be a market for their trust receipts provided by Goodbody and Company?

"Answer: No, sir." [Hearings pp. 202-03].

Plaintiff argues that this chain of testimony establishes that Transcon had a side agreement to purchase deposit receipts from those Queen shareholders who wanted cash. Interstate points out that prior to Commission approval deposit receipts representing 2004 Queen shares, or approximately 10% of Queen stock outstanding, were sold through various brokers.[15] It now appears that these receipts were purchased in the first instance by four Transcon officers, including Scheitel,[16] evidently for the account of Highway Insurance Company of Zurich, Switzerland, a company controlled by Transcon.[17] From this, plaintiff concludes that Moore and Scheitel testified falsely concerning their knowledge as to the identity of the purchaser of the deposit receipts.

Interstate would also carry the chain of inference one step further. The letter of April 28, 1964, from Queen to Transcon offering to sell at $8 per share contained a condition guaranteeing the repurchase of Transcon shares at an agreed price. The testimony is clear that the April 28 offer was rejected by Transcon, and that the final purchase agreement did not include such a condition.

Interstate argues, however, that the evidence shows that Transcon did agree informally to make a market for the receipts and that its officers deliberately falsified their testimony to conceal the (382) existence of such an agree-

[15] See note 10 supra.

[16] See note 11 supra.

[17] Highway Insurance is a Swiss corporation authorized to write all types of insurance outside of Switzerland. Highway is evidently a wholly-owned subsidiary of Western Sales, Inc. Transcon owns 49% of Western's stock, having distributed the remaining 51% to its shareholders in September 1964. The I.C.C. found that Transcon controlled both Western and Highway. 101 M.C.C. at 540 n. 7.

ment. It points to a letter from Moore to Hardison, a major Queen stockholder, accompaning the final agreement to the effect that the deposit receipts could be issued to represent any number of Queen shares, and that they were assignable and prime loan collateral. Additionally, Transcon, through Scheitel, suggested that Goodbody and Company might be able to make a market for the receipts, despite the poor market potential for Queens shares.[18] Finally, Transcon did in fact purchase some deposit receipts, albeit indirectly.

[1] Plainly the fact that false or misleading testimony was given during the course of a judicial proceeding does not constitute a fraud upon the court unless it appears that the court was so misled by such testimony as to render a decision based on a mistaken view of the material facts. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246-247, 250, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); American Cyanamid Co. v. F. T. C., 363 F.2d 757, 772-779 (6th Cir. 1966), on remand, 3 CCH Trade Reg. Rep. ¶ 18,077 (Sept. 29, 1967). This is of course equally true in an administrative proceeding.

[2] There has been no showing here that the I.C.C. was in any material way mislead by the testimony relied upon by Interstate or that it based any part of its decision on a mistaken view of the facts.

Let it be assumed for purpose of argument that Transcon concealed the fact that it purchased deposit receipts for

---

[18] Queen's shares were closely held by a few families. No shares had been sold outside of the family groups prior to the issuance of the deposit receipts.

Queen stock prior to Commission approval. Interstate urges that if this be so disclosure of the facts would have led the Commission to a different conclusion because then it would have found unlawful acquisition of control or consummation of the transaction prior to Commission approval in violation of § 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4).

[3] Plaintiff's reliance upon § 5(4) is misplaced. The record shows that Transcon acquired deposit receipts representing approxixmately 10% of the stock of Queen and 2% of the stock of Virginia. 101 M.C.C. at 539-40. In addition, Transcon had purchased 21% of the stock of Safeway in October 1963. 101 M.C.C. at 540. Having found these facts, [19] the Commission concluded that Transcon had not acquired unlawful control of Virginia, Safeway or Queen within the meaning of § 5(4). 101 M.C.C. 543. In reaching its conclusion the Commission applied the proper test that under § 5(4) control means the power to exercise control or management of the controlled company's operations. See e.g., Gilbertville Trucking Co. v. United States, 371 U. S. 115, 83 S.Ct. 217, 9 L.Ed.2d 177 (1962); Missouri-Pacific R. Co.—Control—Chicago & E.I.R. Co., 327 I.C.C. 279 (1965), aff'd sub nom. Illinois Central R. Co. v. United States, 263 F.Supp. 421 (N.D. Ill.1966), aff'd per curiam, 385 U.S. 457, 87 S.Ct. 612, 17

[19] Interstate also argues that Transcon's concealment of these facts misled the plaintiff into settling its suit against Queen and the Queen stockholders. If this be so plaintiff's remedy lies in the District Court for the Western District of North Carolina which approved the settlement and dismissed the action, and not here.

L.Ed.2d 509 (1967).[20] There was no such control here and the Commission's conclusion is amply supported by the record.

Interstate complains that the Commission made no finding with respect to plaintiff's theory that Transcon had (383) agreed to make a market for the deposit receipts. This is not surprising, however, in view of its ruling, which we have affirmed, that on all the facts presented Transcon's actual ownership of some deposit receipts did not amount to an unlawful acquisition of control in violation of § 5(4).

In reaching its conclusion, the Commission correctly imputed to Transcon control of Western and Highway and ownership of the deposit receipts which had been sold. 101 M.C.C. at 540 n. 7. While the I. C. C. report does not contain an explicit finding that there was no secret agreement on the part of Transcon to purchase or make a market for the deposit receipts, the evidence in the record was quite sufficient to support such a finding. Transcon and Queen officials strenuously denied that there was any such commitment, and the Commission was entitled to credit their testimony. Of course, Transcon's purchase of some deposit receipts does not, by itself, establish the existence of such an agreement.

Moreover, it is significant to note that the I.C.C., upon whom plaintiff alleges fraud in this respect was com-

[20] Plaintiff argues that Transcon's pre-approval purchases of deposit receipts constitute an anti-trust violation within the meaning of Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213, 932, 86 S.Ct. 781, 15 L.E.2d 709, 851 (1966). We need not decide this question in view of our disposition of plaintiff's private anti-trust claim. See Section II, infra.

mitted, makes no such claim to us. Instead, it points out to us in its brief that the Commission found that the "purchase of the depository receipts [was not] a partial consummation of the transactions," 101 M.C.C. at 543, and urges that this necessarily included a finding that there was no agreement, formal or informal, to purchase the receipts.

In view of these findings and conclusions there is no merit to Interstate's contention that the testimony complained of resulted in an order tainted with fraud. There is no showing of reliance by the Commission upon false or misleading testimony, or any indication that the Commission was misled. Equitable intervention by this court is plainly not warranted. Cf. Chas Pfizer & Co. v. Davis-Edwards Pharmacal Corp., 385 F. 2d 533, 537 (2d Cir. 1967); Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948).

Finally, Interstate charges that fraud was committed on the Commission in that Transcon and Queen obtained a favorable tax ruling from the Internal Revenue Service under § 368(b) of the Internal Revenue Code on the exchange of stock by concealing or falsifying the facts with respect to the alleged agreement to purchase and the purchase of Queen's stock by Transcon for cash. Interstate argues that since the approval of the acquisition was conditioned upon such a favorable tax ruling its concealment was in effect a fraud upon the Commission.

Whether in fact such an alleged agreement and purchase would have barred the transaction from qualifying under § 368(b) is in dispute and it is unnecessary to pass upon that question here. The only connection between the tax

consequences of the excahnge of stock transaction and the petition to review is that Transcon's application to the Commission and its contract of purchase were conditioned upon a favorable ruling. The letter ruling was obtained by Queens and Transcon on the basis of facts stated by them to the Revenue Service. Based upon these facts, the Revenue Service determined the tax consequences of the transaction. A favorable letter ruling was issued with respect to Queen on June 15, 1965, and made part of the I.C.C. record as a late-filed exhibit. The letter ruling states that "there is no commitment, formal or informal, by Transcontinental * * * to purchase stock from any of the shareholders of Queen or Realty after consummation of the proposed exchange, or to purchase depository receipts before that time."

[4] The Commission knew plaintiff had made its claims to the Revenue Service, including assertion of the secret agreement theory; it is also a matter of record that its own Bureau of Enforcement had conducted an investigation.[21] Moreover, whatever might be the interest of the Revenue Service, which plaintiff (384) has kept advised,[22] in the tax consequences of the acquisition and the factual justification therefor, it does not lead to nonenforcement of the Commission order. The conditioning of Transcon's application for control upon a favorable letter ruling does not af-

---

[21] See Brief for the I.C.C. at p. 50 and n. 22.

[22] See letter of William R. Burt to Reorganization Branch, Internal Revenue Service, dated October 30, 1964, included as Exhibit E to Complaint Exhibit F; Letter from William R. Burt to Sheldon S. Cohen, Commissioner of Internal Revenue, dated December 7, 1966, included as Exhibit 84 to plaintiff's supplemental appendix.

fect our conclusion. If the ruling is withdrawn, then Transcon or Queen must apply to the I.C.C. for appropriate relief, if they so desire. It should be noted that the I.C.C. order under review is not conditioned upon the continued validity of the letter ruling.

Nor does Interstate's claim that Transcon concealed its 100% ownership of Western Sales during part of August and September, 1964, provide any basis for relief in this proceeding. The letter ruling states that Western was only a 49% subsidiary of Transcon in June, 1965, a statement apparently accurate at that time. Plaintiff argues, however, that Transcon's 100% ownership of Western during a period in 1964 when Highway, a wholly owned subsidiary of Western, purchased some of the Queen deposit receipts would, if disclosed to the Revenue Service, defeat the letter ruling. Regardless of the tax consequences which might flow from Transcon's 100% ownership of Western for a short period, no attempt was made to conceal that fact from the I.C.C. Both the examiner and the Commission found as a fact that Transcon held 100% of Western's stock during part of 1964, until it distributed 51% of Western to its own shareholders. See Examiner's Report p. 29 n. 15; 101 M.C.C. at 540 n. 7. These findings are amply supported by the record.[23]

Upon this record it is plain that plaintiff has not established that the order under review was obtained by fraud. Plaintiff's motion for equitable relief based on fraud is denied.

---

[23] Both Moore, see Hearings pp. 69-70, 898, and Scheitel, see Hearings pp. 167, 231-32, testified as to Transcon's 100% ownership and the subsequent dividend.

Plaintiff has also requested that this court conduct a plenary investigation of the facts, and that it be allowed discovery with respect to the fraud allegations. Since we agree with the Commission and the United States that the Commission was not materially misled, these motions are also denied.

II.

Plaintiff has joined in its action for review of the I.C.C. order approving Transcon's control application, a civil suit against Transcon. The amended complaint alleges claims for relief based on deceit and the anti-trust laws, Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2; Clayton Act § 7, 15 U.S.C. § 18, and seeks divestiture, treble-damages, and an accounting. Both Transcon and the I.C.C. urge that this private action is not properly before the statutory three-judge court.

[5-7] We are mindful that the three-judge procedure should be used sparingly in view of the heavy demands it makes upon judicial manpower, and the burden that direct appeal imposes on the Supreme Court. See United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129, 130-131 (2d Cir. 1967). Consequently the rule has evolved that private claims should not be joined with a petition to review an I.C.C. order unless they are ancillary to or dependent upon the judgment of the court as to the Commission's order. Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980 (1930); compare Luckenbach S. S. Co. v.

United States, 179 F.Supp. 605, 614 (D.Del. 1959), modified on other grounds, 364 U.S. 280, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960). Where the factual basis of the (385) private claims are related to the petition to review, the decision whether to permit joinder before the three-judge court is largely discretionary. See Atlantic Lumber Corp. v. Southern Pac. Co., 47 F.Supp. 511 (D.Ore.1942) (3 judges); id, 47 F.Supp. 514 (D.Ore.1942) (1 judge).[24]

Plaintiff's argument that joinder should be permitted in this case is based largely upon Luckenbach S. S. Co. v. United States, supra, which held that the anti-trust issues and the petition to review were "so inextricably enmeshed that it would be unwarranted to truncate the litigation at this juncture." 179 F.Supp. at 614. There, both claims involved the effect upon the petitioning coastal shipowners of a railroad joint rate which the Commission had refused

---

[24] Plaintiff argues that once our jurisdiction is properly invoked by the petition to review, we have the power to decide, and must decide, all questions of law and fact presented, citing Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 391, 58 S.Ct. 334, 82 L.Ed. 319 (1938), and Sterling v. Constantin, 287 U.S. 378, 393-394, 53 S.Ct. 190, 77 L.Ed. 375 (1932). These cases hold only that a statutory three-judge court may decide any question of state or federal law necessary to decision, and are simply a corollary to the rule that once our jurisdiction is properly invoked, we may decide the case on any ground, including grounds that would not justify our convocation. See United States v. Georgia Public Service Commission, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963). When the issue presented is collateral to the petition for review, as where a merger approved by the I.C.C. is alleged to be violative of the corporate charter of one of the carriers, the collateral issue is not within the jurisdiction of a three-judge court. See Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479, 50 S.Ct, 378, 74 L.Ed. 980 (1930); Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. United States, 275 U.S. 404, 48 S.Ct. 189, 72 L.Ed. 338 (1928).

to suspend. There is no such close connection between the two branches of Interstate's complaint. The primary issue presented by the petition to review is whether the Commission's finding that the acquisitions of control are in the public interest is supported by substantial evidence. Plaintiff's private action against Transcon centers about its alleged contract to purchase Queen, and the consequences flowing from Transcon's conduct prior to Commission approval of these acquistions.[25]

[8] In our view, the issues presented by the petition to review are so different from those raised by plaintiff's private action that joinder is unnecessary to an effective review of the I.C.C. order. See Pittsburgh & W. Va. Ry. Co., supra. Consequently, we dismiss those portions of plaintiff's complaint seeking private relief from Transcon without prejudice to the filing within sixty days of an amended complaint stating the private claims for relief only to be heard before a single district judge.

III.

Plaintiff has moved for pre-trial discovery on the merits against both defendants. Its motions seek depositions and the production of documents by Transcon, and access to internal staff memoranda and opinions from the I.C.C. Both defendants oppose these motions on the ground that

---

[25] In view of our holding that the Commission's order is supported by substantial evidence, see Section IV infra, the acquisitions themselves are exempted from the anti-trust law, 49 U.S.C. § 5 (11). Thus plaintiff's anti-trust remedies, if any, are limited to the period prior to Commission approval. Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213, 932, 86 S. Ct. 781, 15 L. Ed. 2d 709, 851 (1966).

pre-trial discovery is not permitted in an action to review an I.C.C. order; in addition, the I.C.C. asserts a claim of privilege with respect to its internal memoranda and opinions. See T.S.C. Motor Freight Lines, Inc. v. United States, 186 F.Supp. 777 (S.D.Tex. 1960), aff'd sub nom. Herrin Transp. Co. v. United States, 366 U.S. 419, 81 S.Ct. 1356, 6 L.Ed.2d 387 (1960).

[9, 10] On review of an I.C.C. order, this court's task is limited to determining whether the Commission's conclusions are adequately supported by its (386) findings of fact, and whether the findings are supported by substantial evidence on the record as a whole. E. g., United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971 (1942); Eastern Central Motor Carriers Ass'n v. United States, 239 F.Supp. 591 (D.D.C.1965). In making this determination, the court considers only the evidence contained in the record made before the Commission, and cannot accept evidence de novo. See Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524 (1930); Frozen Food Express v. United States, 219 F.Supp. 131 (N.D. Texas 1963); cf. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 54 S.Ct. 692, 78 L.Ed. 1260 (1934). The only exceptions are cases falling within the jurisdictional facts doctrine, see Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), or challenging a rate order as confiscatory, see American Trucking Ass'ns v. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936). This case falls within neither of these exceptions

and we are limited to consideration of evidence contained in the record made before the I.C.C.

[11, 12] Rule 26 entitles a party to examine his opponent as to any matter not privileged which is reasonably calculated to lead to the discovery of admissible evidence. While Rule 26 should not be read narrowly, it plainly precludes depositions in those situations where no evidence could be admitted in any event. See Walled Lake Door Co. v. United States, 31 F.R.D. 258 (E.D.Mich.1962). Nor has plaintiff shown the requisite good cause to entitle it to discovery and inspection pursuant to Rule 34. Plaintiff's motions for discovery are denied.

IV.

With these matters disposed of we turn to the merits.

Interstate claims that the order of the I.C.C. should be set aside because:

(a) The issuance of deposit receipts by Transcon without prior Commission approval violated § 20a(2) of the Interstate Commerce Act, 49 U.S.C. § 20a(2).

(b) The issuance of these receipts and Transcon's purchase of some of them gave Transcon prior control of Queen in violation of § 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4).

(c) Transcon's conduct with respect to the issuance and purchase of deposit receipts violated § 7 of the Clayton Act, 15 U.S.C. § 18.

(d) The Commission ignored the anti-competitive effects of permitting a duopoly in the intercity bus industry.

Appendix A

A. The Section 20a claim.

Section 20a(2), made applicable to motor carriers by 49 U.S.C. § 314, makes it unlawful for any carrier "to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier * * * or to assume any obligation or liability * * * in respect of the securities of any other person" without obtaining prior approval from the I.C.C. Approval may be granted only if the Commission finds that the issue "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Interstate argues that the deposit receipts issued by the respective depository banks to assenting stockholders of Queen and other acquired companies in return for their stock constitutes securities within the meaning of § 20a, and their issuance without prior commission approval voids the acquisition transactions.

This argument was not raised before the Commission until August 24, 1966, two years after the receipts had been issued, and after the I.C.C. had rendered its decision. Prior to August 1966, Interstate had insisted that the deposit receipts were subject to the registration (387) requirements of the Securities Act of 1933. To maintain this position, plaintiff was forced to assert that the deposit receipts were not within the purview of Section 20a, in order to avoid the exemption of regulated carriers' securities from S.E.C. jurisdiction contained in 15 U.S.C. § 77c(6).

[13, 14] It is well settled that the refusal of the Commission to reopen a case to consider an argument presented for the first time after decision was rendered will not be overturned unless its action was a clear abuse of discretion. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535, 66 S.Ct. 687, 90 L.Ed. 821 (1946); United States v. Northern Pac. Ry. Co., 288 U.S. 490, 53 S.Ct. 406, 77 L.Ed. 914 (1933). Here, the Commission's refusal was clearly justified by the failure of Interstate timely to raise the issue, the dubious merit of its claim and the complete absence of any prejudice to Interstate. Nor is it surprising, considering the late date of Interstate's petition for reconsideration, that the Commission set forth no reasons for denying it. Compare Yourga v. United States, 191 F.Supp. 373, 377 (W.D.Pa.1961); Carolina Scenic Coach Lines v. United States, 59 F.Supp. 336 (W.D.N.C.), aff'd per curiam, 326 U.S. 680, 66 S.Ct. 37, 90 L.Ed. 398 (1945).

[15] The key issue is whether the deposit receipts, used as a mechanism for maintaining the status quo pending application to the I.C.C. for approval, are to be treated as securities within the meaning of § 20a. The dominant Congressional purpose in enacting that section was to protect investors in the securities of railroads and other carriers from the all too frequent abuses of financial manipulation, watered stock, and over-extended capital structures. See Chicago S. Shore & S. Bend R. R. v. United States, 221 F.Supp. 106 (N.D.Ind.1963); Sharfman, The Interstate Commerce Commission 190 (1931).

Thus it was provided that before a *carrier* could issue any capital stock, bonds, or long term notes, assume lia-

bilities or other obligations, it must apply to the Commission for authority to do so, upon a showing of the corporate purpose underlying the transaction and compatibility with the public interest. The requirement of prior Commission approval has also been held to apply to any transaction by which a carrier changes or affects the terms of some or all of its securities. See United States v. New York, New Haven & Hartford R. R. Co., 276 F.2d 525 (2d Cir. 1960).

[16] In our view this established body of law does not compel the conclusion that the deposit receipts used here are securities as that term is used in § 20a. First, it should be noted that the deposit receipts were not issued by Transcon with respect to *its* stock, but by the depository bank as a receipt for shares of Queen deposited with it by Queen shareholders. Thus the deposit receipts could scarcely be viewed as securities of Transcon, as Interstate seems to claim, but only as securities of Queen.

The deposit receipts did not affect the capital structure of Queen, or alter the terms of Queen stock to the disadvantage of its shareholders or in violation of its corporate purpose. Nor did they entitle Transcon to any control of Queen prior to Commission action or affect its financial condition. Only when the I.C.C. acted upon Transcon's application for control, an application which also requested authority to issue the Transcon shares necessary to perform the exchange agreement, did Transcon issue any securities. Thus it seems plain that the deposit receipts are not securities requiring § 20a approval prior to issuance, though the Commission has, upon application, accepted jurisdiction over similar receipts and

given such approval. See Delaware, L. & W. R. R. Co., Merger, 257 I.C.C. 91 (1944). Moreover, the Commission's action in approving Transcon's issuance of stock necessarily included consideration of the propriety of the deposit receipts and recognized their validity. Compare New York, Chicago & St. Louis R. R. v. Frank, 314 U.S. 360, 62 S.Ct. 258, 86 L.Ed. 277 (1941); (388) Breeding Motor Freight Lines v. Reconstruction Finance Corp., 172 F.2d 416 (10th Cir. 1949).

[17] Finally, it should be noted that the remedy provided for violation of § 20a is that the security shall be void. 49 U.S.C. § 20a(11). Subsection 11 also provides that any holder of a void security who acquired it in due course from any person may sue for damages, and that one who bought directly from the issuing carrier may at his option sue for damages or rescind. Plaintiff does not fit within Subsection 11, and could not take advantage of its provisions were the deposit receipts void or voidable. It certainly has no such remedy in this proceeding.[26]

---

[26] We do not understand the decision of the Supreme Court last term in Denver & Rio Grande Western R. R. Co. v. United States, 387 U.S. 485, 87 S. Ct. 1754, 18 L.Ed. 2d 905 (1967) to affect our conclusions. There the court held that when a corporation subject to I.C.C. jurisdiction sought approval under § 20a to issue stock, amounting to 20% of its outstanding stock, to another carrier, as part of a program leading to control by the other carrier, the Commission is obligated to consider at that stage in the proceedings whether issuance of the stock to the other carrier would pass control or violate the Clayton Act. We read the case to mean that where an acquisition by one carrier of stock in another carrier comes to the attention of the Commission, it must determine, at the earliest practicable stage, whether the transaction will pass control and whether it is in the public interest. Here we feel that criterion was met by the I.C.C. determining that the entire transaction was consonant with the National Transportation Policy upon an application seeking authority under both § 20a and § 5(2).

B. Claimed violation of Section 5(4).

Section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4), makes it unlawful for any person to control, or exercise the power of control over, the management of any carrier without obtaining prior approval from the Commission. Interstate asserts that Transcon committed two violations of § 5(4) by first, its purchases of a small number of Queen deposit receipts, and second, through power given Transcon over Queen by the terms of the deposit receipts themselves. We have already affirmed the Commission's finding that Transcon did not acquire control of Queen through purchases of deposit receipts. (supra, p. 382). Plaintiff's second contention need detain us little longer.

[18] Interstate points to the language of the deposit receipts which made the deposit irrevocable except upon the joint consent of Transcon and Queen, and which prohibited either Transcon or Queen from taking any action outside the ordinary course of business without the consent of the other party. These provisions are said to have given Transcon an effective veto power over Queen's operations by preventing Queen's management from making major policy decisions on its own, and by keeping the Queen stockholders locked into the deal with Transcon.[27]

---

[27] While the deposit receipts entitled the holder to receive the dividends from and to vote the underlying Queen shares, his freedom of choice was circumscribed. Queen could not withdraw from the exchange agreement without breaking its contract with Transcon. Nor could it have changed the course of its business without running the risk of violating the deposit agreement. If a holder of Queen deposit receipts became dissatisfied he was free to transfer the receipts to another, but the transferee would remain bound by the terms of the deposit agreement.

In our view, however, these factors would not have warranted a finding by the Commission that Transcon had acquired in fact the power to control the regular operations of Queen. Compare Gilbertville Trucking Co. v. United States, 371 U.S. 115, 83 S.Ct. 217, 9 L.Ed.2d 177 (1962). While the I.C.C. made a general finding that Transcon did not have control of Queen prior to Commission approval, see 101 M.C.C. at 543, there is no specific finding that the terms of the deposit receipts did not serve to pass that power to Transcon. This is not surprising in view of Interstate's (389) failure to present the argument it now makes to the Commission. Even in the doubtful event that a technical violation of § 5(4) could be found to have occurred, the Commission would have been justified, in finding, particularly in light of its conclusion that the transaction was in the public interest, that the transgression did not warrant denying the public of the benefits of the acquisition. See Illinois Central R. Co. v. United States, 263 F.Supp. 421 (N.D.Ill.1966), aff'd 385 U.S. 457, 87 S.Ct. 612, 17 L.Ed. 2d 509 (1967).

C. Refusal to proceed under § 11 of the Clayton Act.

During the summer of 1965, several months after the hearings before the trial examiner were closed, Interstate wrote to the Commission claiming that Transcon's purchases of deposit receipts violated § 7 of the Clayton Act, 15 U.S.C. § 18, and requesting the Commission to issue a complaint pursuant to § 11 of that Act, 15 U.S.C. § 21. In November 1965, the Commission replied refusing to take action on its own motion and suggesting that Interstate file a formal complaint. On December 10, 1965, after the

examiner's recommended decision had been filed, interstate filed a complaint alleging that Transcon's purchases of deposit receipts violated the Clayton Act.[28] The Commission dismissed the complaint on the ground that it pertained to facts of record and matters at issue in the control proceedings, which had already gone beyond the hearing stage.

Interstate attacks this action of the Commission as an abdication of its responsibilities under § 11. The core of plaintiff's position is the assertion that Transcon's conduct prior to Commission approval, though after it had applied therefor, should be measured under the standards of the Clayton Act, and not of the Interstate Commerce Act. Applying Clayton Act standards, Interstate asserts that stock purchases by competitors, are anti-competitive under § 7, and that Transcon's purchases of deposit receipts fall within the proscription of that section. In this court, plaintiff has added the further claim that the deposit receipts froze-out other prospective purchasers of Queen and thus erected a significant barrier to the entry of new competition into the intercity bus industry.

[19] The duties of the I.C.C. under the Clayton Act cannot be viewed apart from the provisions of § 5 of the Interstate Commerce Act. Whatever merit there might be to plaintiff's theory if a regulated carrier purchased stock in a competitor and took no further action, that is

---

[28] The complaint was given docket number MC-C 4969 and was served by the Commission on Transcon, Queen, and the other parties to the acquisition proceedings. The complaint was dismissed by Division 3, and reconsideration was denied by the Commission. See notes 1, 2, supra.

not what happened here. Transcon negotiated for the stock of the three carriers with a view toward obtaining control only if the Commission approved. Transcon did not simply purchase Queen stock for cash, but in exchange for stock to be issued with Commission approval. Thus, it is apparent that the Commission had the opportunity to examine the transaction on the application under § 20a, and at that time to discharge any duties imposed on it by the Clayton Act. Compare Denver & Rio Grande Western R. R. Co. v. United States, 387 U.S. 485, 87 S.Ct. 1754, 18 L.Ed.2d 905 (1967). To hold in these circumstances that the Commission was obligated to consider separately Interstate's petition under § 11 of the Clayton Act, when the same issues were being fully ventilated in other Commission proceedings involving the same subject matter, would place an unwarranted burden on an already overloaded agency.

[20] Moreover, we cannot accept Interstate's argument that the Commission must measure Transcon's pre-approval conduct under the terms of the Clayton Act and not the Interstate Commerce Act. As has been made abundantly clear by the Supreme Court, see, e.g., Penn-Central Merger and N & W. Inclusion (390) Cases, 389 U.S. 486, 498-501, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968); Seaboard Air Line R. R. Co. v. United States, 382 U.S. 154, 86 S.Ct. 277, 15 L.Ed.2d 223 (1965), the principles of the National Transportation Policy, 49 U.S.C. preceding § 1, are the dominant yardstick by which consolidations in the transportation industry are to be measured. Under § 5 of the Interstate Commerce Act, the I.C.C. is given the power to approve a transaction which furthers the National

Transportation Policy even though it might otherwise be contrary to the goals of the Clayton Act.

The sometimes contradictory goals of the anti-trust laws and the Interstate Commerce Act require that each transaction be judged on its own facts. Here Interstate makes two specific claims. First, it argues that Transcon acquired control of the assets of Queen in violation of Clayton Act § 7 when the Queen shareholders assented to the exchange agreement. Even assuming this doubtful proposition, in our view the proper test of control is not the incipiency formula of the Clayton Act, but the standards of §§ 5(4), 5(5) of the Interstate Commerce Act. Under those standards the I.C.C. properly found that control had not passed prior to its approval.

[21] Interstate's second claim is that the terms of the deposit agreement froze-out potential competitors such as Interstate who wanted to buy Queen. The flaw in this argument is the failure to recognize the key premise underlying the regulated transportation industry that entry must be restricted in order to protect the public interest. To enter the bus industry, a potential competitor would either have to apply for certificates of convenience and necessity authorizing the new service, or purchase an extant carrier and obtain approval of the transaction from the Commission. In light of this statutory structure, the deposit receipt mechanism used here can hardly be said to have erected any additional barriers to the entry of new competition.

Giving proper effect to the necessary interaction between the Clayton and Interstate Commerce Acts, we find that the Commission acted well within its discretion in dismissing Interstate's complaint under the Clayton

Act since the matters raised there were fully considered under correct legal standards in the control proceedings. There is no requirement that an agency cover the same ground twice.

D. The "duopoly" theory

Interstate's overriding argument is that by approving these acquisitions the I.C.C. has frozen the intercity bus industry for all time into a "duopoly" dominated by Greyhound and Transcon. According to plaintiff, with the inclusion of the southeastern Trailways carriers into Transcon, there are no longer enough independent companies left to form a third nationwide bus company. This result is said to violate the anti-trust laws and require reversal of the Commission's order.

[22] Much of plaintiff's argument is based on the erroneous legal premise that the Commission must give controlling weight to anti-trust considerations. As the Supreme Court has repeatedly held, while the Commission cannot ignore the policies of the anti-trust laws, the primary considerations are the standards set forth in § 5(2)(c) of the Interstate Commerce Act. See Penn-Central Merger and N. & W. Inclusion Cases, 389 U.S. 486, 498-501, 88 S.Ct. 602, 19 L.Ed. 2d 723 (1968); Seaboard Air Line R. R. Co. v. United States, 382 U.S. 154, 86 S.Ct. 277, 15 L.Ed.2d 223 (1965); Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 80 S.Ct. 229, 4 L.Ed.2d 223 (1959); McLean Trucking Co. v. United States, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544 (1944). In its report approving Transcon's application the Commission carefully explored the effect of the consolidations on the public interest and gave due weight to anti-trust considerations.

[23] First, the Commission noted that the routes of Transcon and the three acquired companies overlapped only slightly, so there was almost no duplication in the service they provided. It was shown that substantial savings (391) could be achieved by joint operation of the companies through centralizing their bookkeeping, volume purchasing, inventory reduction, and more efficient equipment utilization. Transcon's control would also result in better service to the public by the establishment of more through-service schedules replacing present cumbersome and inadequate pooling arrangements. Finally, better terminal facilities could be expected from centralization of policy control of joint terminals in Transcon, and from new terminals which Transcon could build with its superior financial resources. These and the other findings relied on by the Commission amply support its conclusion that the acquisitions are in the public interest.

Turning to Interstate's "third force" argument, the Commission first noted that it was speculative at best.[29]

---

[29] Interstate has never made it clear whether its "third force" of intercity bus carriers was to be built by separating the southeastern carriers from N.T.S. or from within N.T.S. If they were separated from N.T.S. this would leave Greyhound as the only carrier group offering nationwide service. If they were to remain in N.T.S. then the question is not one of duopoly, since that condition would still be present, but whether Transcon or Interstate was better fit to control a strengthened N.T.S. There is no persuasive evidence that the stockholders of Queen or the other companies would be willing to deal with Interstate if Transcon's application were rejected. Nor is there any evidence as to Interstate's ability to operate a bus system. Finally, it should be noted that even if a duopoly is assumed to exist, there is no certainty that the industry will retain that structure for all time. It is certainly possible that if increases in intercity bus traffic warrant, the I.C.C. would, upon proper study, create a "third force" by certificating new or additional routes for new carriers.

Evidence at the hearings had shown that many previous attempts to consolidate the southeastern Trailways carriers had failed, and there was no indication that Interstate's efforts would succeed. More importantly, Interstate had not filed any application to purchase or control these carriers, or offered to do so on terms equivalent to Transcon's. Compare Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 80 S.Ct. 229, 4 L.Ed.2d 223 (1959). Indeed, it settled and released any rights it might have had to purchase Queen.

Finally, the Commission rejected Interstate's "duopoly" claim, noting that the intercity bus industry had long been dominated by Greyhound with Trailways a poor second.[30] Nor was there any real doubt that Transcon was the most powerful member of the N.T.S. Group. The Commission concluded that the public interest would be best served by strengthening Transcon's hand in N.T.S. in order to make that system a more effective competitor of Greyhound. This was in accord with the similar long-standing I.C.C. policy of encouraging "the unification of the properties of carriers under common control in order to foster efficiency and to lessen wasteful transportation in furtherance of the national transportation policy." 101 M.C.C. at 549. We have carefully reviewed the record and have concluded that the Commission's findings are based on substantial evidence and fully support its conclusion that the acquisitions are in the public interest.

---

[30] The record showed that in 1963 Greyhound earned 61% of the operating revenue of Class 1 Intercity Bus Carriers. Trailways earned 23%, which included the 11.27% earned by Transcon. Including the acquired companies would make Transcon's share 18%.

V.

We have considered and determined the merits of the various contentions made by Interstate for the reason that the propriety of the Commission's judgment ought not to be left to speculation in face of the numerous charges of fraud. In doing so, however, we wish it understood that we entertain serious doubts that Interstate has standing to raise its claims in this action in any event[31]

(392) [24-26] The touchstone for standing to sue under the Interstate Commerce Act is whether the Commission action threatens or produces legal injury. Pittsburgh & W. Va. Ry. Co. v. United States, 281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980 (1930); Moffat Tunnel League v. United States, 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069 (1933); Edward Hines Yellow Pine Trustee v. United States, 263 U.S. 143, 44 S.Ct. 72, 68 L.Ed. 216 (1923). The fact of intervention before the Commission is not enough by itself to establish standing. See Seatrain Lines, Inc. v. United States, 152 F.Supp. 619 (D.Del.), aff'd per curiam, 355 U.S. 181, 78 S.Ct. 265, 2 L.Ed.2d 186 (1957). Standing is accorded to competitors whose businesses are affected by Commission action as, for example, when new operating rights are granted or new services authorized. See American Trucking Ass'ns. v. United States, 364 U.S. 1, 80 S.Ct.

---

[31] This is not to say that plaintiff lacks standing to assert such private remedies, if any, as it may have under the anti-trust laws. See Carnation Co. v. Pacific Westbound Conference, 383 U. S. 213, 932, 86 S. Ct. 781, 15 L. Ed. 2d 709, 851 (1966); Utah Gas Pipeline Corp. v. El Paso Natural Gas Co., 233 F. Supp. 955 (D. Utah 1964).

1570, 4 L.Ed.2d 1527 (1960); Alton R. R. Co. v. United States, 313 U.S. 15, 62 S.Ct. 432, 86 L.Ed. 586 (1942). Shippers, states, counties or groups, and others, whose interests are affected may also be given standing. See 28 U.S.C. § 2323.

[27] Under these standards it seems plain to us that plaintiff has no interest at all in the acquisition of Virgina and Safeway. Interstate is not a competitor, a shipper, or even a resident of the areas served by these companies. Its sole connection with the bus industry—that it once claimed to have a contract to purchase Queen—is not enough to entitle it to challenge the acquisitions of Virginia and Safeway.

Interstate's position vis-á-vis the Queen transaction is somewhat less remote. It claims to have had a contract to purchase Queen which was allegedly breached at the instance of Transcon. Had it gone before the Commission in that posture and filed a rival application to purchase Queen upon equitable terms satisfacory to the Commission, there is little doubt that it would have had standing to attack the resulting order. But instead of proceeding in this manner, Interstate chose to sue Queen and the Queen shareholders for breach of contract in the federal court for the Western District of North Carolina. It is significant that that suit did not ask for specific performance but sought damages only. After the hearings on Transcon's application were completed and before the examiner's report was filed, Interstate settled its suit with Queen for $25,000. The terms of settlement required Interstate to give releases to Queen, the Queen shareholders and Transcon, and to agree to withdraw its opposition to

the acquisition. Pursuant to this agreement Interstate wrote the I.C.C. and asked to withdraw as a party to this case.

Shortly thereafter, claiming that the settlement had been procured by fraud, and that Burt, its president who controlled it, was not authorized to release Transcon, Interstate cancelled its withdrawal from these proceedings and has been vigorously pursuing the case ever since.[32] At no time has Interstate ever moved to set aside the settlements in the federal court in North Carolina where they were approved and entered, or for that matter offered to return the consideration it received for these agreements.

[28] Thus, while Interstate might have had standing under its contract to purchase Queen, it now appears that it contracted that right away. The releases required by the settlement, if valid, completely discharge any liability the Queen shareholders might have had to sell their stock to Interstate. While we do not pass (393) upon the question of the validity of the releases, we think that the proper way to raise that question is by proceedings to set aside the settlement and order of dismissal in Interstate's action against Queen in the Western District of North Carolina where the settlement was approved and the order entered.

---

[32] The Commission steadfastly refused to consider the validity of Interstate's alleged contract to purchase Queen, or whether the settlement and releases were obtained by fraud. The I.C.C. felt that these were private matters to be resolved in court between the parties. These rulings of the Commission were correct.

VI.

In addition to the issues we have discussed, Interstate raises a number of other questions. We have considered all of these in our review of the record and find none of them to have merit or warrant discussion.

We hold that the Commission committed no errors of law requiring reversal and that its findings and conclusions and the order under review are fully supported by substantial evidence in the record as a whole. The order of the I.C.C. under review is in all respects affirmed.

It is so ordered.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-F-8744[1]

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—VIRGINIA STAGE LINES, INC.

Decided August 10, 1966

REPORT OF THE COMMISSION

TUGGLE, *Comissioner:*

Exceptions, including a motion to consolidate the instant proceedings with the proceedings in Nos. MC-F-8343[2] and MC-F-8348, and exceptions, including requests (1) for oral argument and (2) that the Commission, on its own motion, designate Nos. MC-F- 8744 and MC-F-8774 as transactions involving issues of general transportation importance, were filed by Greyhound Lines, Inc. (Greyhound), and Interstate Investors, Inc. (Investors), respectively, protestants.

---

[1] This report embraces No. MC-F-8774, Transcontinental Bus System, Inc.—Control—Queen City Coach Co., Finance Docket No. 23123, Transcontinental Bus System, Inc., Stock, and Finance Docket No. 23159, Transcontinental Bus System, Inc.—Stock.

[2] *Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches,* 97 M.C.C. 733, hereinafter referred to as the *Greyhound* case.

Appendix B

Transcontinental Bus System, Inc. (Transcon), National Trailways Bus System (NTB), Safeway Trials, Inc. (Safeway), and Queen City Coach Company (Queen), replied. Limited exceptions were filed by applicant (Transcon) in Finance Docket Nos. 23123 and 23159. A petition for leave to intervene in opposition to the proceedings in Nos. MC-F-8744 and MC-F- 8774 was filed by Hamish Turner (Turner), and Transcon and Queen replied. Investors also filed a petition requesting that certain late-filed exhibits be accepted, that applicant be required to file certain late-filed exhibits, and that the applications be dismissed with prejudice, and a motion that certain additional data be considered in conjunction with such petition. Our conclusions differ slightly from those of the examiner in Finance Docket Nos. 23123 and 23159.

NATURE OF THE PROCEEDINGS

In No. MC-F-8744, by application filed May 7, 1964, as amended and supplemented, Transcon, of Dallas, Tex., seeks authority under section 5 of the Interstate Commerce Act to acquire control of Virginia Stage Lines, Incorporated (Virginia Stage), of Charlottesville, Va., and Safeway, of Washington, D. C., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc. (TNE), of Washington, Tennessee Trailways, Inc. (Tenn. T), of Knoxville, Tenn., Service Coach Line, Inc. (SCL), of Tampa, Fla., Carolina Scenic Stages (Scenic), of Spartanburg, S. C., Water Street Equity Corporation (WEC), of Charlottesville, Coastal Stages Corporation

(Coastal), of Spartanburg, and The Gray Line of Charleston (Gray), of Charleston, S. C.

By separate application filed May 13, 1964, in Finance Docket No. 23123, Transcon seeks authority under section 214, and in connection with the above-described control transaction, to issue 824,158 shares of its common capital stock, par value $1 per share, together with such additional shares as may be required to cover any fractional shares to which the participating stockholders might be entitled because of the trade ratios.

In No. MC-F-8774, by application filed June 5, 1964, as amended and supplemented, Transcon seeks similar authority to acquire control of Queen, of Charlotte, N. C., through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc. (Smoky), Georgia-Florida Coaches, Inc. (Ga-Fla.), Fort Bragg Coach Company, Inc. (Bragg), and General Realty and Insurance Corporation (GRIC), all of Charlotte, and of Tenn T, Scenic, Coastal, and Gray.

By another application also filed June 5, 1964, in Finance Docket No. 23159, Transcon seeks authority under section 214, and in connection with the transaction in No. MC-F-8774, to issue 219,356 shares of its common capital stock, par value $1 per share, together with such additional shares as may be required to cover any fractional shares to which the participating stockholders might be entitled because of the trade ratios.

A hearing was held on a consolidated record, at which Greyhound and Investors opposed the applications, cross-

examined witnesses, and introduced evidence.[3] Initially, The Amalgamated (532) Transit Union filed a formal protest, but stipulated of record with Transcon that the employees involved would not be adversely affected by approval of the transactions, and simultaneously requested the Commission to reserve jurisdiction for a period of 3 years from the date of consummation for the purpose of protecting the interest of such employees. Our findings will be appropriately conditioned. See *Transcontinental Bus System, Inc.-Control,* 85 M.C.C. 383. Briefs were filed by Transcon, Virginia Stage and WEC, Safeway and TNE, Queen and GRIC, Greyhound, and Investors. Transcon operates substantially more than 20 vehicles in transportation in interstate or foreign commerce subject to part II of the act. The factual findings set forth in the examiner's report are substantially accurate and are adopted by us. Only those facts necessary for our discussion have been repeated here.

The Parties to the Applications

Transcon's corporate history, organization, affiliation, and operations are described in *Continental Tenn. Lines, Inc.-Control-Tennessee Coach,* 87 M.C.C. 775 (the *Tennessee* case), and the case cited therein. Transcon has numerous stockholders, the 10 largest holding approximately 42 percent, and none more than 8 percent. In

---

[3] Petition of Investors for reopening of proceedings for further hearing was denied by order of division 3, dated November 24, 1965. Petition for reconsideration of said order is being denied concurrently herewith.

Transcontinental Bus System, Inc.-Control, supra, it was found that no single stockholder or group of affiliated stockholders controlled or had the power to control Transcon within the purview of the principle enunciated in *Refiners Transport & Term. Corp.-Purchase-Marshall,* 39 M.C.C. 271, and the same conclusion is warranted here. Transcon and the other carriers involved in these transactions are members of NTB, a voluntary, nonprofit association composed of some 44 motor common carriers of passengers, which offers its members advantages of a trade name, standardized bus colors, and joint advertising.

Transcon's operations are divided into three divisions, Continental Central Lines, Continental Dixie Lines, and Continental Western Lines. With its 16 subsidiaries, Trascon operates over routes in 36 States, extending generally to New York, N. Y., Philadelphia, Pa., and Washington, D. C., on the east, Atlanta, Ga., New Orleans, La., Brownsville and El Paso, Tex., Tucson, Ariz., and San Diego, Calif., on the south, Los Angeles and San Francisco, Calif., Portland, Oreg., and Seattle, Wash., on the (533) west, and Salt Lake City, Utah, Billings, Mont., Omaha, Nebr., Chicago, Ill., and Cleveland, Ohio, on the north.

Virginia Stage's corporate history, organization, affiliation, and operations are set forth in *National Trailways Bus System-Control-Trailways,* 75 M.C.C. 179, and the *Tennessee* case, *supra.* It operates between Washington, Richmond, Charlottesville, Lynchburg, and Roanoke, Va., Durham, N. C., Huntington, W. Va., and Cincinnati, Ohio.

Safeway's corporate history, organization, affiliation, and operations are described in *National Trailways Bus*

System-Control-Trailways, supra; Trailways of New England, Inc.-Purchase-Interstate, 93 M.C.C. 217 (the *TNE-Interstate* case), and No. MC-F-8745 *Safeway Trails, Inc.-Purchase-Reading Transp. Co., decided December* 11, 1964 (not printed). It operates between New York City and Washington, via Philadelphia and Baltimore, Md., and between Atlantic City, N. J., and Reading and Lancaster, Pa., via Philadelphia and Wilmington, Del.

Queen's corporate history, organization, affiliation, and operations are described in *Queen City Coach Co. and Smoky Mountain Stages-Control,* 50 M.C.C. 325, and *Queen City Coach Co.-Control-Smoky Mountain Stages,* 70 M.C.C. 77. It operates over routes radiating clockwise from Charlotte to Kingsport and Bristol, Tenn., Hickory, Winston-Salem, Greensboro, Durham, Goldsboro, and Wilmington, N. C., Myrtle Beach and Charleston, S. C., Sylvania and Augusta, Ga., Greenwood and Anderson, S. C., and Asheville, N. C.

TNE, owned jointly by Virginia Stage and Safeway, operates between Portland, Maine, and Berlin and Littleton, N. H., on the north, and New York City, on the south, via Boston and Springfield, Mass., and New Haven, Conn. Tenn T, owned one-third each by Virginia Stage, Smoky, and Continental Tennessee Lines, Inc., (CT) (a subsidiary of Transcon), operates in an area extending from Roanoke and Bluefield, W. Va., to Knoxville, Nashville, and Chattanooga, Tenn., and Atlanta. SCL, jointly controlled by Virginia Stage, Tamiami Trail Tours, Inc., of Tampa (Tamiami), and Carolina Coach Company (CCC), operates primarily in Georgia, serving Gainesville and Albany, on the west, and Augusta, Savannah, and Jacksonville, Fla.,

on the east. Scenic, jointly controlled by Queen and Virginia Stage, operates in an area extending from Asheville, Marion, and Charlotte, N. C., to Orangeburg and Anderson, S. C., and Augusta. Scenic controls Coastal, which operates mainly between Charleston, on the one (534) hand, and, on the other, Myrtle Beach, Camden, and Orangeburg, S. C., and Gray, which provides a sightseeing service in the Charleston area.

WEC, controlled by Claude A. Jessup and other members of the Jessup family, is a noncarrier owning certain real property which it leases to Virginia Stage. Smoky, controlled jointly by Transcon and Queen, serves an area bounded generally by Asheville and Greenville, S. C., Augusta, Athens, and Atlanta, Ga., and Chattanooga, Sweetwater, Knoxville, and Newport, Tenn. Bragg, controlled by Queen, operates between Fayetteville and Fort Bragg, N. C. GRIC, a noncarrier, having some stockholdlers in common with Queen, is an insurance company and owner of real property used by Queen and its subsidiaries. Ga-Fla, owned two-thirds by Bragg and one-third by GRIC, operates between Augusta and Lake City, Fla., via Waynesboro, Midville, Dublin, and Douglas, Ga., and between Waynesboro and Wadley, Ga.

Virginia Stage is the sole stockholder of Allentown and Reading Transit Co. (ART), Safeway Transit Co. (ST), Safety Motor Transit Co. (SM), and Lynchburg Transit Co. (LT), which provide local transit service in Allentown, Pa., Wilmington, N. C., and Roanoke and Lynchburg, Va., respectively. Trailways Service, Inc. (TS), and Trailways Terminal of Washington (TT), are garage and terminal

facilities located in Washington, whose stock is jointly owned by Virginia Stage and Safeway. The former and CCC jointly own Trailways Bus Terminal, Inc. (TB), a Richmond, Va., passenger terminal. Trailways Garage of Philadelphia (TG) is a garage facility in that city owned by Safeway.

Queen, CCC, and GRIC, respectively, own 50, 25, and 25 percent of the capital stock of Charlotte Union Bus Station, Inc. (CU), a joint passenger station in Charlotte. Asheville Union Bus Station, Inc. (AU), is a joint passenger terminal in Asheville, whose capital stock is held 45, 45, and 10 percent by Queen, Smoky, and Scenic, respectively. Trailways Bus Depot of Atlanta, Inc. (TA), a joint passenger facility in Atlanta, is owned one-third each by Smoky, Tamiami, and Continental Crescent Lines, Inc., the last being wholly owned by Transcon. Queen and Tenn T each own 50 percent of Bristol Trailways Bus Station, Inc. (BT), a joint passenger facility in Bristol.

The Agreements

Under a tripartite agreement dated March 26, 1964, Transcon would exchange .85 of a share of its stock for each share of (535) Virginia Stage's stock and 273.85 shares and 2.5 shares, respectively, of its stock for each share of WEC's common and preferred stock. Stockholders of Virginia Stage and WEC may become a party to the agreement by delivering within a stated period an appropriate letter to a named bank which is serving as a depositary and their shares in proper form for transfer. The de-

positary would issue a receipt corresponding to the number of shares delivered. The underlying shares may not be withdrawn except upon the termination of the agreement or entry of final orders by appropriate regulatory bodies either approving or denying the applications. Until transfer of the stock to Transcon, the holders of the receipts would have all voting and dividend rights. Generally, Virginia Stage and WEC, or their subsidiaries, are not to perform any act or enter into any transaction outside the ordinary course of business, and Transcon is not to declare or pay any dividend on its common stock, perform any act, or enter into any agreement which will substantially dilute the value of such stock.

Under another agreement, dated April 22, 1964, Transcon would exchange .36 of a share of its stock for each share of Safeway's classes A and B capital stock. In most other respects, the two exchange agreements are basically the same. Nearly all of the involved stock has been deposited in escrow.

Under separate agreements dated May 16, 1964, there would be an exchange of 7.25 shares of Transcon's stock for each share of the stock of Queen and GRIC. The remaining terms are essentially the same as those in the Transcon-Virginia Stage agreement. All of the involved stock has been placed in escrow. Internal Revenue Service has ruled that no gain or loss for tax purposes will be recognized as a result of the exchange of the stock of Virginia Stage, WEC, Safeway, Queen, and GRIC for that of Transcon.

Queen's board of directors also has approved employment contracts with L. A. Love, president, and W. E.

Smith, chairman of the board, as noted in the report of the examiner. We agree with the examiner that there is no basis for a conclusion that these contracts are intended as indirect devices for increasing the consideration offered for the sellers' capital stock. Compare *Dealers Transit, Inc.—Control and Merger.* 87 M.C.C. 571.

ISSUES ON EXCEPTIONS

(536) The examiner recommended that the section 5 applications be granted, with the condition that jurisdiction shall be reserved for a period of 3 years for the protection of employees of applicant and its affiliated companies. He found, among other things, that Investors' alleged purchase of Queen's capital stock and the claimed advantages to itself and the public may not properly be considered in the absence of an appropriate application; that there is no law requiring the Commission to develop for the record economic material as to the competitive structure in the industry; that the Commission need accord weight to antitrust policy in a section 5(2) proceeding only if the proposed merger may substantially lessen competition or tend to create a monopoly; that no monopoly would emerge from approval of the instant transactions; that in competion for motor carrier for-hire operations, Greyhound is, and will remain, after approval of the transactions, the giant of intercity bus transportation; that the matter of Investors' attempt to purchase Queen's capital stock is a dispute between such parties for settlement between themselves or in the court; that the Commission is required to determine the instant applications on their merits; that

the depositary receipts are subject to the terms of the related agreements and the number thereof sold does not affect the control of Queen and GRIC; and that although in October 1963, Transcon purchased 21 percent of Safeway's stock, the facts of record do not warrant a finding that Transcon thereby acquired the power to exercise control or management of Safeway's operations.

He further recommended, in Finance Docket Nos. 23123 and 23159, that Transcon be authorized to issue not exceeding 590,347 shares and 217,296 shares of common capital stock, respectively, having found that since certain of the shares of stock sought to be issued by Transcon would be immediately thereafter surrendered for cancellation, there was no need for the issuance of such stock.

Transcon contends that the number of shares of stock it should be authorized to issue should be modified. In Finance Docket No. 23123, it alleges that, contrary to the examiner's conclusions, issuance to WEC and Virginia Stage of 144,347 and 89,964 shares, respectively, although ultimately to be returned to Transcon for cancellation, has a definite and integral place in the transaction. It states that each of the stock trades, by contract, contemplates (537) a tax-free trade; that at least 80 percent of the stockholders of each class of stock must participate; that it is impossible to obtain such percentage of participation, insofar as Virginia Stage and/or Safeway is concerned, without actually issuing and trading the said 234,311 shares; and that the tax rulings require that these shares be issued and traded in order for the tax advantage to exist. In Finance Docket No. 23159, Transcon admits that although the tax ruling will not be defeated in the event it is not authorized

to issue the 1,160 shares of stock to Queen in return for stock in GRIC, since 80 percent of each class of stock is obtainable, it has been represented to the Internal Revenue Service that the transaction will be handled in that manner. Transcon therefore renews its request for such authority in full.

In its exceptions and motion, Greyhound contends that the recommended decision of the examiner in the instant proceedings is so diametrically opposed to the decision of division 3 in the *Greyhound* case as to demand that the proceedings be consolidated for determination by the entire Commission; that the Commission cannot apply different standards of proof for different applicants; and that the examiner erred in his evaluation of the evidence herein and in failing to make a determination respecting the unlawful control aspects of these proceedings. Greyhound fears that approval will mean that Transcon will control most North Carolina bus terminals under the terms of a State law relating to joint terminals at all points of joint service, thus diverting traffic from Greyhound to Trailways more than at present because Transcon offers almost nationwide service.

Investors contends that the examiner has made findings which are not based upon reliable, probative and substantial evidence; that Transcon has consummated purchases of stock without authorization from the Commission and in violation of the Clayton Act; that the examiner failed to pass on the legality of the sale of the depositary receipts issued for Queen and GRIC stock to affiliates of Transcon, or to list Transcon as a principal stockholder thereof; that the examiner failed to find that Transcon

had concealed an important fact from the Commission in not disclosing that it had purchased Eastern Carolina Corporation; that the Commission has concealed from the examiner information developed in an investigation of Transcon; that purchases of depositary receipts for stock were unlawful; that the examiner erred in not requiring audited income statements from GRIC; that the examiner failed to recognize that the instant trans- (538) actions are within the scope of a transaction posed by Investors which the Commission's Bureau of Finance ruled would not be permitted; that the Commission would abuse discretion granted by the Congress if, without a compelling transportation requirement, it created a duopoly on a national scale in the bus industry; that the Commission must dispose of issues relating to perjury by Transcon's witnesses and conspiracy to conceal violations of the Clayton Act prior to passing on the merits of the instant transactions; that the findings of the examiner are fatally defective and must be set aside in the absence of a decision concerning violations of the Clayton Act; and that reliability and adequacy of the information on which Commission decisions are to be based requires extraordinary care to protect the public interest. Investors requests oral argument and that the Commission, on its own motion, designate these proceedings as involving issues of general transportation importance.

In his petition, Hamish Turner, the former controlling stockholder of Scenic, alleges that the latter withdrew its protest in these proceedings after certain representations by Queen and Virginia Stage; that attached to the contract for the sale of stock to Queen and Virginia Stage,

was a promissory note for most of the purchase price; that petitioner consummated the sale of his stock[4] with the understanding that Queen and Virginia Stage would give him a negotiable promissory note for most of the purchase price, with the balance to be paid in cash and a second promissory note, which was to be non-negotiable; that Queen and Virginia Stage have refused to issue him the negotiable promissory note, and to release to him the stock of Carolina Insurance and Investment Company owned by Scenic and not included in the sale to Queen and Virginia Stage; that petitioner intends to file a petition to reopen the proceeding in No. MC-F-8648;[5] and that because such petition might result in denying Queen and Virginia Stage authority to control Scenic and its subsidiaries, he files exceptions to that part of the examiner's report herein authorizing Transcon to acquire control of Scenic from Queen and Virginia Stage.

In reply, applicants contend that Investors' exceptions are not in conformity with rule 1.15 of the General Rules of Practice;[6] (539) that the facts in the instant transactions and the Greyhound case are dissimilar, and the Commission is capable of separately weighing the evidence in each case, determining the applicable law and rendering just decisions; and that the different result in the two cases stems not from the application of conflicting criteria, but

---

[4] Pursuant to No. MC-F-8648, *Eastern Trailway, Inc.—Control —Carolina Scenic Stages*, 97 M.C.C. 469, Queen and Virginia Stage were authorized to acquire joint control of Scenic. The transaction was consummated October 23, 1964.

[5] No such petition had been filed as of July 8, 1966.

[6] The exceptions substantially conform to the requirements of the rule.

rather from the application of the same criteria to conflicting factual situations.

Applicants further contend that there is no evidence of record that Transcon and its related companies have acquired sufficient stock of Queen, Virginia Stage, and Safeway to control those carriers; that the statements concerning the percentages of stock involved has been considered by the Commission; and that there is no merit to protestants' contention of unlawful control. They argue that the Commission is not the proper forum to determine the bus terminal situation in North Carolina; but assuming it is, Greyhound has failed to point to any probative evidence of record supporting the effect on it as relates to operations out of those terminals. On the larger competitive issues, applicants state that the examiner has properly concluded that Greyhound constitutes a virtual monopoly in the bus industry; that Transcon and its subsidiaries will be substantially strengthened by virtue of these transactions so that new and additional competition will be created; that approval of these transactions would tend to result in the creation of a duopoly; that the proposed combination of the carriers herein would be sufficiently strong to withstand the predatory competitive practices of Greyhound, albeit that after consummation, one member of the so-called duopoly would be less than one-third the size of the other; that it is more realistic to create a duopoly in an effort to get some semblance of nationwide competition with Greyhound than to disrupt the present transactions in favor of would-be entrants into the bus industry and the creation of a "third force;" that Investors' arguments against a duopoly are based on

cases which have been decided solely under the antitrust laws and have no applicability to mergers and acquisitions under the jurisdiction of the Commission; and that Investors was present at the hearing and was at liberty to produce any evidence it considered to be more informative than that which was provided by Transcon.

Applicants further state that the percentage of depositary receipts sold to Highway Insurance Company of Zug, Switzerland (Highway), represents slightly less than 10 percent of the stock of Queen, slightly less than 15 percent of the stock of GRIC, and (540) slightly less than 2 percent of the stock of Virginia Stage; that Highway is a wholly owned subsidiary of Western Sales, Ltd. (Western), or which Transcon owns 49 percent; that neither Western nor Highway is controlled by Transcon;[7] that the latter and M. E. Moore are not privy to the sale of the depositary receipts to Highway; that based upon the purchase by Highway of the depositary receipts, Investors has raised the question of violation of section 7 of the Clayton Act in three different forms, whereas as a matter of law there has been no violation of the Clayton Act; that the Commission is the only body with jurisdiction to decide what effect, if any, the proposed transactions will have upon competition; that there can be no violation of section 7 of the Clayton Act unless and until the Commission finds that the transactions will reduce or eliminate competition;

---

[7] In 1964 the remaining 51 percent of the capital stock of Western was distriubted to some 2,800 stockholders of Transcon. Highway is a wholly owned subsidiary of Western. In our opinion, a presumption is warranted that Transcon controls Western and Highway. See *Lease Plan International Corp.—Control—National,* 93 M.C.C. 173, 180 ff.

that the examiner has found that the proposed transactions will create new competition rather than reduce competition; and that Investors' allegation that the transactions will reduce competition is based upon matters outside the record.

Applicants contend that since the stock for which the depositary receipts stand is exempt from the jurisdiction of the Securities and Exchange Commission (SEC), insofar as issuance is concerned, the depositary receipts are likewise exempt; that since the SEC declined to intervene herein, it is proper to conclude that it does not consider the depositary receipts to have been illegally sold; that there is no evidence of record that Transcon made any arrangement or agreement with any stockholder of Queen, GRIC, Virginia Stage, or any of the other carriers to be acquired, to supply cash for the purchase of the depositary receipts, or to agree that said depositary receipts would be purchased, or to set a price to be paid for them; that, because the Commission's Bureau of Enforcement has not sought to intervene in these proceedings, its investigation of Transcon in connection with the sale of the depositary receipts evidently revealed no improper act; that the examiner is fully aware of the investigation and, presumably its results; that in October 1963, Transcon purchased 21 percent of the outstanding stock of Safeway; and that no depositary receipts issued for the remaining 79 percent of the stock have since been purchased by Transcon, Highway or any other entity or person to Transcon's knowledge.

(541) Applicants aver that the testimony of 11 bus executives who possess a combined experience of 356 years in op-

erating intercity bus companies, of 168 exhibits and 1,285 pages of transcript constitutes the only reliable, probative and substantive evidence upon which the examiner has based his findings; that Queen contracted to purchase Eastern Carolina Corporation, a noncarrier, prior to the Transcon stock trade contract; that Transcon will shoulder the liability, through Queen, in the event these transactions are approved; that the purchase by Queen of Eastern Carolina is not a transaction subject to the jurisdiction of the Commission and there was no thought of concealing information when nothing was said on the record in connection with the purchase; that the earnings figures used to compute the trade ratios for all of the companies involved in these transactions were based upon figures acquired from audited reports; that the fact that some of the profits of GRIC for the year 1963 were realized from sale of real estate is not material, its effect on the trade ratios being *de minimis;* that these proceedings and the transaction posed by Investors for an opinion by the Commission's Bureau of Finance[8] have nothing in common, with the exception of the fact that the stock of Queen and GRIC would be deposited with a bank in either case; that the circumstances under which it would be deposited, however, are entirely different; that the fact certain things have happened in other industries creates no inference that the same thing should occur in the bus industry; that what happens to the competitive situation in the bus industry must be decided by the Commission based upon facts and practical reality that exists in the industry;

---

[8] Such opinion would not be binding on the Commission anyhow.

and that there is nothing in the record to show that the competitive situation in the broadcast industry or the airline industry or any other industry is in any way comparable to the competitive situation in the bus industry.

They also contend that Turner's petition to intervene is untimely filed and states no compelling reason why he should be made a party intervener in these proceedings; and that the proceeding in No. MC-F-8648 is the proper forum in which Turner should resolve his dispute with Queen and Virginia Stage.

Discussion and Conclusions

At the hearing herein, the examiner granted Transcon's motion to add Seenic, Coastal and Gray as carriers of which Transcon (542) would acquire indirect control.[9] Identical amendments, however, were filed in both section-5 proceedings. Accordingly, the titled application, to the extent of the amendment, will be dismissed. Tenn T, having been included as a subject carrier in both proceedings, the application in No. MC-F-8774 will be dismissed as to it. The motion of Transcon to dismiss the application in No. MC-F-8744, insofar as authority is sought therein to acquire control of SCL and WEC also will be granted as only a third interest in the stock of the former would be acquired and the latter is not a carrier. The applica-

---

[9] In *Eastern Trailways, Inc.—Control—Carolina Scenic Stages, supra,* Queen and Virginia Stage were authorized to acquire joint control of Scenic, and, in turn, of Coastal and Gray, through purchase of capital stock.

tion in No. MC-F-8774 also will be dismissed as to GRIC, as it is a noncarrier.

These proceedings could be consolidated with the *Greyhound* case if we could find that such action would best conduce to the proper dispatch of business and to the ends of justice. (Interstate Commerce Act, section 17.) In our opinion, there is no similarity or relationship between the instant proceedings and the *Greyhound* case. The former involves principally the acquisition by Transcon of control of three carriers and their affiliates operating along the eastern Seaboard, and the latter involves acquisitions by Grayhound and affiliates in the West. The proceedings involve different applicants, separate records have been established in each case, and each must be considered on its merits. In doing so separately, no difficulty should be experienced in evaluating the evidence, determining the applicable law and reaching proper decisions. Too, the proceedings are in different stages. We conclude that to disturb the procedural process by consolidating them at this time would not conduce to the proper dispatch of business and to the ends of justice. Accordingly, Greyhound's motion will be denied.

Investors' request for oral argument also will be denied. The facts relating to these transactions are of record herein, have been thoroughly argued by applicants and protestants in briefs, exceptions and various other pleadings, and we conclude that oral argument is unnecessary to a proper determination of the issues.

The outstanding common capital stock of the several carriers sought to be acquired herein has been deposited with certain banks, for which depositary receipts were

issued to the stockholders. Certain of the depositary receipts have been purchased (543) by Highway, which is authorized to write all types of insurance outside of Switzerland. Highway owns slightly less than 10 percent of the outstanding stock of Queen, slightly less than 15 percent of the outstanding stock of GRIC, and some what less than 2 percent of the outstanding stock of Virginia Stage. The stock of Highway is owned by Western, a designer and seller of busses, with 49 percent of the stock of Western owned by Transcon. In October 1963 Transcon purchased 21 percent of Safeway's stock. However, in our opinion, the facts of record do not warrant a finding that Transcon has acquired control of Virginia Stage, Safeway, Queen and GRIC, or the power to exercise control or management of their operations.[10] Nor is the purchase of the depositary receipts a partial consummation of the transactions, which are based on an exchange of shares of Transcon's stock for shares of stock of the carriers to be acquired.

The contention of Greyhound that different criteria have been applied in the *Greyhound* case and the instant cases has been rendered moot by our subsequent action reopening *Greyhound* for reconsideration on the present record. No final decision has yet been reached in that matter.

---

[10] On November 23, 1965, in No. MC-F-9165, a complaint and request for investigation filed by Greyhound, alleging premature control by Transcon of Queen, Virginia Stage, and Safeway without prior approval under section 5(2) of the act, was dismissed as to the complaint and denied as to the request for investigation. Investors' petition for reconsideration is being denied concurrently herewith.

Appendix B

Greyhound's contention that the establishment of another single-line operation between Main and Florida would, because of the North Carolina terminal problem, enable Transcon to divert from Greyhound long-haul traffic, in our opinion, is without merit. We agree with the examiner that Greyhound has not adduced any evidence by which to measure the actual or potential loss of revenue, even assuming it were operating at a disadvantage because of the terminal problem. We doubt that the acquired carriers will divert any more interline traffic to Transcon upon it becoming their corporate parent than they formerly did when Transcon was only a fellow member of NTB.

Investors takes the position that the examiner erred in failing to apply the criteria set forth in the Clayton Act to determine the effect the instant transactions will have on competition in the bus industry. Investors apparently relies upon the decision of a three-judge court in *Florida East Coast Railway,* 242 Fed. Supp. 14, 22 (544) (1965), which has been vacated and remanded to that court[11] by the Supreme Court of the United States (*Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 86 S. Ct. 277, 278). In its per curiam decision, the Supreme Court stated (footnote omitted):

> • • •By thus disposing of the case, the District Court did not reach the ultimate question whether the mer-

---

[11] By a decision of June 8, 1966, after the remand, the said court sustained the decision of the Commission in *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122 (1963), the *Seaboard* case. An appeal has been taken on grounds not pertinent herein.

ger would be consistent with the public interest despite the foreseeable injury to competition.

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States,* 32 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S., 173 (1959). As we said in Minneapolis, at 186:

> 'Although section 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws." 321 U.S., at 85-86. The problem is one of accommodation of section 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposal [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy." 321 U.S., at 87.'

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in

accordance with the criteria quoted above that such a merger would be consistent with the public interest.' 54 Stat. 908, 49 U.S.C. section 5(2)(b) (1964 ed.).

Based upon the foregoing, it is clear that while the policy underlying the antitrust laws cannot be disregarded,[12] the Congress generally has immunized carrier acquisitions and mergers (545) from the purview of the Clayton Act and intended that the Commission exercise its expertise in determining the competitive effect of any carrier merger or acquisition and whether the proposal would be consistent with the public interest. The Commission is not bound by any criteria laid down under the Clayton Act, even where it may find that a certain merger or acquisition actually will result in reduction of competition. We

---

[12] In the *Seaboard* case, on pages 128 and 129, the Commission stated:

The congressional purpose in enacting section 5(2) was to facilitate mergers and consolidations in the national transportation system. *Maintenance Employees* v. *United States*, 366 U.S. 169, 172, 173 (1961). In administering section 5(2), we are not to "measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws." *McLean Trucking Co.* v. *United States, supra*, at 84-85. However, we may not disregard the policy underlying the antitrust laws even though carriers participating in a merger are relieved by section 5(11) from the operation of such laws. *Minneapolis & St. L. R. Co.* v. *United States, supra*. Our primary task is to reconcile the objective of "preventing injurious waste and in securing more efficient transportation service," *New York Central Securities Corp.* v. *United States, supra*, at 26, with the general concern of Congress "that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps strung across a hundred cities at a time." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 346 (1962). In short, our "problem is one of accommodation of section 5(2) and the antitrust legislation." *Minneapolis & St. L. R. Co.* v. *United States, supra*, at 186.

may still find that other factors in the public interest outweigh and override the reduction of competition in a given instance. The examiner, in our opinion, did not err in failing to apply in these proceedings those criteria set forth under the Clayton Act.

Mergers, acquisitions, or consolidations are not unlawful or improper *per se,* and conflict with the antitrust laws only where they might result in a substantial lessening of competition or tend toward the creation of a monopoly. In passing on a voluntary consolidation or merger of motor carriers we are only required to look for standards prescribed by section 5(2)(c) of the Interstate Commerce Act. The primary test to be met here is whether the merger or consolidation will be compatible with the public interest. Although we are required to make a determination with respect to the competitive effect of such transactions in considering the question of public interest, the size or strength of the carriers involved or whether they are competitive or noncompetitive is not determinative. The term "public interest," as stated in *New York Central Securities Co.* v. *United States,* 287 U.S. 12, 25 (1932), has a direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. These are the criteria.

Here, the proposed transactions will not result in a reduction of competition, but will substantially increase competition, which factor is pointed out in the report of the examiner. While there (546) is some duplication in operations of Transcon and the carriers involved in the proceedings herein, essentially between Washington, D. C., and

Baltimore, Md., Philadelphia, Pa., and New York, N. Y., and to some extent between Tenn T and CT in Tennessee comprising, at most, some 350 miles of a total of 10,860 miles operated by the carriers to be controlled, or about 3.5 percent, there is virtually no duplication in service provided. The carriers to be controlled now provide through service between points in their respective areas under interline arrangements and Transcon and the subject carriers have cooperated closely for many years as NTB members. Centralized control of the various operations in Transcon would permit the establishment of more through services and improved service all to the benefit of the public. Assuming *arguendo,* as does the examiner, that even though some reduction in competition might result, the record is clear that the other benefits which would flow from approval herein would be in the public interest and override any effect from such decrease in competition.

Investors argues that it would create a "third force" to compete with Greyhound and Transcon. Its ability to do this is doubtful at best. However, no application has been filed for the consolidation of any of the several carriers herein involved under the ownership of Investors for the creation of such "third force." Investors, by comparing the situation in the bus industry to that existing in other industries, fails to realize the peculiarities of the competitive problem resulting from the fact that bus companies must operate over specific authorized routes and between specified points. Regardless of whether a pattern may have been established in other industries that there shall be not less than three major competitors, and where the area served may depend upon depth of the sales staff, no

such pattern has been established for the bus industry. In administering the act, the question is consistency with the public interest, and whether the public convenience would be served. Will the transaction enable the involved applicant to provide an improved service by motor vehicle to the advantage of the riding public and not thereby unduly restrain competition? The public desires bus service from a single terminal to almost any destination and carriers which can be relied upon for reasonable reliability, cleanliness, safety, frequency of schedules, and (547) adequate terminal facilities. Greyhound and Trailways (NTB) have satisfied this demand. Many independent bus companies have not.

Assuming *arguendo* that Greyhound and Trailways (NTB), constitute a duopoly already, these applications portend nothing new for they involve primarily a strengthening of the Trailways system. While the Trailways system today is neither a single company nor a single group of related companies, it is already dominated by Transcon and its affiliates.

To finance the transactions in No. MC-F-8744, Transcon seeks to issue 824,158 shares of its authorized common stock for the participating stockholders' shares, apportioned as follows:

Company	*Outstanding shares*	*Transcon shares*
Virginia Stage	393,650	334,603
WEC (preferred)	1,219	3,048
WEC (common	791	188,139
Safeway (class A and B)	1,050,000[1]	298,368

[1] Includes a total of 221,200 shares of class A and B stock owned by Transcon.

Appendix B

WEC owns 169,820 shares of Virginia Stage's stock for which it would receive 144,347 shares of Transcon stock. Virginia Stage owns 249,900 shares of Safeway's stock for which it would receive 89,964 Transcon shares. The examiner was of the opinion that since the 234,311 shares which WEC and Virginia Stage would acquire would be returned to Transcon's treasury for cancellation, there was no need to issue more than 590,347 shares, including 500 shares to cover any fractional shares that might be required to be issued to the participating stockholders. As above indicated, applicant contends that each of the stock trades contemplates a tax free trade; that in order to have such a trade under the rules of the Internal Revenue Service, at least 80 percent of the stockholders of each class of stock must participate; that it is impossible to obtain such participation without actually issuing and trading the 234,311 shares; and that the tax rulings require that these shares be issued and traded in order for them to be operative.

To finance the transactions in No. MC-F-8774, Transcon would issue 161,414 shares of its stock for the 22,264 shares of Queen's (548) stock and 57,942 shares for the 7,992 shares of GRIC's stock, or a total of 219,356 new shares. The examiner was of the opinion that since the 1,160 Transcon shares Queen would receive for its 160 shares, of GRIC stock, together with 1,000 shares of Transcon stock owned by Queen would be returned to Transcon's treasury for cancellation, there was no need to issue more than 217,296 shares including 100 shares to cover any fractional shares that might be required to be issued to the

participating stockholders. As above indicated, applicant contends that although the tax ruling will not be defeated in the event Transcon is not authorized to issue the 1,160 shares of stock to Queen, since 80 percent of each class of stock may be obtained, representation has been made to the Internal Revenue Service that the transaction will be handled in that manner. While we deem the representation inmaterial considering the limited number of shares involved, we will authorize issuance of the number of shares sought.

Accordingly, authority will be granted in Finance Dockets Nos. 23123 and 23159 for Transcon to issue not exceeding 824,658 shares and 219,456 shares of its common stock, respectively, the former including 500 shares and the latter 100 shares to cover any fractional shares to which the participating stockholders might be entitled because of the trade ratios. Such is on the condition, however, that the 236,411 shares to be issued to WEC, Virginia Stage, and Queen will, as proposed, be returned to Transcon's treasury.

Investors' petition requesting that it be permitted to file certain late-filed exhibits and other relief and its motion that certain additional data be considered in conjunction with said petition, will be denied under rule 86 of the General Rules of Practice.[13] To accept and consider such late-filed exhibits and additional data, in the absence of a stipulation that same might be filed, would be deprivation of the

---

[13] Rule 86 reads, in part, as follows: "* * * the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, * * *."

right of applicants to cross examination thereon. *Standard Motor Freight, Inc.—Purchase—Madison Transp.*, 65 M.C.C. 249. Furthermore, it does not appear that such additional evidence would affect our conclusions herein.

The averments in the petition of Turner are not reasonably pertinent to the issues presented herein and the petition will be denied. The dispute between Turner and Queen and Virginia Stage is a matter which properly should be resolved in the courts.

(549) No fixed charges would be incurred in these transactions since only an exchange of stock is involved. Our findings contemplate that the reservation of jurisdiction for carrier-employee protection satisfies the requirements of section 5(2)(c)(4).

It has been a consistent policy in section-5 proceedings to encourage the unification of the properties of carriers under common control in order to foster efficiency and to lessen wasteful transportation in furtherance of the national transportation policy. While it is Transcon's present intention to maintain the subject carriers as separate corporate entities with the same management, Transcon is admonished to give consideration to a plan for corporate simplification of the multiple common carriers which will be controlled by it, with a view toward seeking authority for unification of the operations into a lesser number of carriers. See the *Tennessee* case at page 780. Absent such a plan, future control applications by Transcon may be disapproved.

In No. MC-F-8744, we find that acquisition by Transcontinental Bus System, Inc., of control of Virginia Stage

Lines, Incorporated, and Safeway Trails, Inc., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., and Tennessee Trailways, Inc., through such acquisition of control, upon the terms and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitute transactions within the scope of section 5(2)(a), and will be consistent with the public interest; provided, however, that if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 3 years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representatives, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transactions under the authority herein granted.

In No. MC-F-8744, we further find that to the extent Service Coach Line, Inc., Carolina Scenic Stages, Coastal Stages Corporation, The Gray Line of Charleston, and Water Street Equity Corporation are joint parties applicant, the application should be dismissed.

(550) In No. MC-F-8774, we find that acquisition by Transcontinental Bus System, Inc., of control of Queen City Coach Company through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., Fort Bragg Coach Company, Inc., and Carolina Scenic Stages, and, in turn,

of Coastal Stages Corporation and The Gray Line of Charleston through such acquisition of control, upon the terms and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; provided, however, that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 3 years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representative, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transaction under the authority herein granted.

In No. MC-F-8774, we further find that to the extent Tennessee Trailways, Inc., and General Realty and Insurance Corporation are joint parties applicant, the application should be dismissed.

In Finance Dockets Nos. 23123 and 23159, we find that issuance by Transcontinental Bus System, Inc., in connection with the transactions authorized in Nos. MC-F-8744 and MC-F-8774, of not exceeding 824,658 shares and 219,456 shares of its common capital stock, $1 par value each, respectively, upon the terms and conditions and for the purposes previously set forth, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and

consistent with the proper performance by Transcontinental Bus System, Inc., of service to the public as a common carrier, and which will not impair its ability to perform that service and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of August 1966.

No. MC-F-8744

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—
VIRGINIA STAGE LINES, INC.

No. MC-F-8774

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—
QUEEN CITY COACH CO.

Finance Docket No. 23123

TRANSCONTINENTAL BUS SYSTEM, INC.—STOCK

Finance Docket No. 23159

TRANSCONTINENTAL BUS SYSTEM, INC.—STOCK

Investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed a report containing

its findings of fact and conclusions thereon, which report and the report of the examiner are hereby made a part hereof:

It is ordered, That, in No. MC-F-8744, the acquisition by Transcontinental Bus System, Inc., of Dollars, Tex., of control of Virginia Stage Lines, Incorporated, of Charlottesville, Va., and Safeway Trails, Inc., of Washington, D. C., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., of Washington, and Tennessee Trailways, Inc., of Knoxville, Tenn., through such acquisition of control be, and it is hereby, approved and authorized, subject to the terms and conditions set forth in the report.

It is further ordered, That the application in No. MC-F-8744, to the extent Service Coach Line, Inc., of Tampa, Fla., Carolina Scenic Stages and Coastal Stages Corporation, both of Spartanburg, S. C., The Gray Line of Charleston, of Charleston, S. C., and Water Street Equity Corporation, of Charlottesville, are joint parties applicant be, and it is hereby, dismissed.

It is further order, That, in No. MC-F-8774, the acquisition by Transcontinental Bus System, Inc., of Control of Queen City Coach Company, of Charlotte, N. C., through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., and Fort Bragg Coach Company, Inc., all of Charlotte, and Carolina Scenic Stages, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston, through such acquisition of control be, and it is hereby,

approved and authorized, subject to the terms and conditions set forth in the report.

It is further ordered, That the application in No. MC-F-8774, to the extent Tennessee Trailways, Inc., and General Realty and Insurance Corporation, of Charlotte, are joint parties applicant be, and it is hereby, dismissed.

It is further ordered, That, in Finance Dockets Nos. 23123 and 23159, in connection with the transactions authorized in No. MC-F-8744 and MC-F-8774, Transcontinental Bus System, Inc., be, and it is hereby, authorized to issue not exceeding 824,658 and 219,456 shares, respectively, of common capital stock, par value of $1 per share, for the purposes and upon the terms and conditions set forth in said report.

It is further ordered, That if the parties to the transactions authorized in Nos. MC-F-8744 and MC-F-8774 desire to consummate same, they shall confirm in writing to the Commission, immediately after consummation, the dates on which consummation has actually taken place.

It is further ordered, That if the authority herein granted is exercised, Transcontinental Bus System, Inc., shall submit for consideration, in each proceeding, a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and

title to which each item has been, or is to be, debited or credited.

It is further ordered, That the authority herein granted shall be effective 35 days from the date of service of this order.

It is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force and effect.

It is further ordered, That except as herein authorized, the capital stock authorized to be issued in Finance Dockets Nos. 23123 and 23159, shall not be sold, pledged, repledged, or otherwise disposed of by Transcontinental Bus System, Inc., unless and until so ordered or approved by this Commission.

It is further ordered, That Transcontinental Bus System, Inc., shall report concerning the matters involved in Finance Dockets Nos. 23123 and 23159 in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 214 of the Interstate Commerce Act (49 CFR 56.6).

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividend thereon, on the part of the United States.

It is further ordered, That recital in said reports of balance sheet and other financial data shall not be con-

strued as approving accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That the motion of Greyhound Lines, Inc., that the proceedings herein be consolidated with proceedings in Nos. MC-F-8343 and MC-F-8438 be, and is hereby, denied.

It is further ordered, That the request of Interstate Investors, Inc., for oral argument, be, and it is hereby, denied; and,

It is further ordered, That the petition of Interstate Investors, Inc., requesting that it be permitted to file certain later-filed exhibits and for other relief, and its motion that certain additional data be considered in conjunction with said petition be, and they are hereby, denied.

By the Commission.

H. NEIL GARSON,
Secretary.

(Seal)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Served November 1, 1965

No. MC-F-8744[1]

TRANSCONTINENTAL BUS SYSTEM, INC.—CONTROL—
VIRGINIA STAGE LINES, INC.

---

(2) REPORT AND ORDER

RECOMMENDED BY M. L. WINSON, HEARING EXAMINER

INTRODUCTION

Transcontinental Bus System, Inc., of Dallas, Tex., by an application filed on May 7, 1964, in No. MC-F-8744, as amended and supplemented, seeks authority under section 5 of the Interstate Commerce Act to acquire control of Virginia Stage Lines, Incorporated, of Charlottesville, Va., and Safeway Trails, Inc., of Washington, D. C., through purchase of their outstanding capital stock, for consideration later described and, in turn, of Trailways of New England, Inc., of Washington, Tennessee Trailways, Inc., of Knoxville, Tenn., Service Coach Line, Inc. of Tampa, Fla., Carolina Scenic Stages, of Spartanburg, S. C., and Water

---

[1] This report embraces No. MC-F-8774, Transcontinental Bus System, Inc.—Control—Queen City Coach Co., Finance Docket No. 23123, Transcontinental Bus System, Inc.—Stock, and Finance Docket No. 23159, Transcontinental Bus System, Inc.—Stock.

Street Equity Corporation, of Charlottesville, and, in turn, of Coastal Stages Corporation, of Spartanburg, and The Gray Line of Charleston, of Charleston, S. C. By another application filed on June 5, 1964, in No. MC-F-8774, as amended and supplemented, Transcontinental Bus System, Inc., seeks similar authority to acquire control of Queen City Coach Company, of Charlotte, N. C., through purchase of its outstanding capital stock, for consideration discussed below, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., and Fort Bragg Coach Company, Inc., also of Charlotte, Tennessee Trailways, Inc., Carolina Scenic Stages, and General Realty and Insurance Corporation, of Charlotte, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston.[2] In applications filed on May 13, and June 5, 1964, in Finance Dockets (3) Nos. 23123 and 23159, Transcon seeks authority under section 214 of the Act to issue 807,043 shares of its common capital stock, $1 par value each, of which 589,847 shares would finance the transactions in No. MC-F-8744 and 217,196 shares those in No. MC-F-8774. No representation has been made by any State authority respecting the section-214 applications.

The four applications were referred to the Examiner for hearing and recommendation of appropriate orders. Such hearing was held on a consolidated record on September 9-15 and October 26-9, 1964, in Washington, at which Greyhound Lines, Inc., and Interstate Investors, Inc., herein called Greyhound and Investors, opposed the applications,

---

[2] The above parties, in the sequence named, will be identified as Transcon, Virginia Stage, Safeway, TNE, Tenn T., SCL, Scenic, WEC, Coastal, Gray, Queen, Smoky, Ga-Fla, Bragg, and GRIC.

cross-examined witnesses, and introduced evidence. The Amalgamated Transit Union filed a formal protest thereto, but stipulated of record with Transcon that the employees involved in the transactions would not be adversely affected by their approval, and simultaneously requested the Commission to reserve jurisdiction for a period of three years from the date of consummation for the purpose of protecting the interest of such employees. The findings herein will be appropriately conditioned. See *Transcontinental Bus System, Inc.—Control,* 85 M.C.C. 383. Briefs were filed by Transcon, Virginia Stage and WEC, Safeway and TNE, Queen and GRIC, Greyhound, and Investors. Transcon utilizes considerably more than 20 motor busses in performing transportation under Part II of the Act. Its operating revenues in 1962, 1963, and the first half of 1964 aggregated $13,967,314, $14,452,879, and $6,661,569, respectively. Unless otherwise stated, the parties herein engaged in transportation operate in interstate or foreign commerce as motor common carriers of passengers over regular routes. Certain motions of several parties will be considered at an appropriate place in this report.

Transcontinental's Corporate History, Affiliation, Operations, and Financial Data

Transcon's corporate history, organization, affiliation, and operations are described in *Continental Tenn. Lines, Inc.—Control—Tennessee Coach,* 87 M.C.C. 775, and the case cited therein. It is authorized to issue 4,000,000 shares of common capital stock, par value $1 each, of which 1,981,172 shares are outstanding. There are numerous

stockholders, with the 10 largest holding approximately 42 percent, and none more than 8 percent. In *Transcontinental Bus System, Inc.—Control, supra,* it was found that no single stockholder or group of affiliated stockholders controlled or had the power to control Transcon within the purview of the principle enunciated in *Refiners Transport & Term. Corp.—Purchase—Marshall,* 39 M.C.C. 271, and the same conclusion is warranted here. Approval herein would not materially change this situation. Transcon holds varying proportions of the capital stock of many carriers and non-carries, the latter owning mostly bus terminals and restaurants. It, as well as the subject carriers, is a member of National Trailways Bus System, herein called TBS, which is a voluntary, non-profit membership association of motor common carriers of passengers, (4) formed in 1936 for the purpose of promoting travel over their lines, improving their service, effecting economies in operation, and fostering safety programs and practices, through the establishment of joint terminals, coordination of schedules, transportation of passengers with minimum interchange of busses, joint advertising of services, joint purchase of supplies, and use of common color schemes and trade-marks. *National Trailways Bus System—Control—Trailways,* 75 M.C.C. 179, and *Trailways of New England, Inc.—Pur.—Boston & M. Transp.,* 80 M.C.C. 697. By advertising the name of "Trailways", the members are identified by the public as a group of carriers rendering through service nationally, and thus are better able to compete with Greyhound's nation-wide motorbus operations. Ibid. TBS is currently composed of some 44 carriers, with control and management of its affairs vested in a 14-member

board of directors, 6 representing Transcon and its subsidiaries. Dues and other charges are assessed in proportion to each member's passenger revenue of the last calendar year before election of the board, the portion of the Transcon companies amounting to 46.38 percent. The number of votes depends on such revenue, subject to a maximum limit.

Transcon's operations are divided into three divisions, Continental Central Lines, Continental Dixie Lines, and Continental Western Lines. With 16 subsidiaries (15 wholly controlled and one 50 percent), it operates over 45,575 miles of routes in 36 states, bounded generally by New York, N. Y., Philadelphia, Pa., and Washington, on the east, Atlanta, Ga., New Orleans, La., Brownsville and El Paso, Tex., Tucson, Ariz., and San Diego, Calif., on the south, Los Angeles and San Francisco, Calif., Portland, Ore., and Seattle, Wash., on the west, and Salt Lake City, Utah, Billings, Mont., Omaha, Nebr., Chicago, Ill., and Cleveland, Ohio, on the north. Some of the principal points served, aside from those just named, are Harrisburg and Pittsburgh, Pa., Detroit, Mich., Toledo and Columbus, Ohio, Indianapolis, Ind., Birmingham and Mobile, Ala., Chattanooga, Nashville, and Memphis, Tenn., Shreveport, La., Houston, Dallas, and Fort Worth, Tex., Denver, Colo., Albuquerque, N. M., Little Rock, Ark., Oklahoma City, Okla., St. Louis and Kansas City, Mo., and Des Moines, Iowa. Transcon and its affiliates operate 1,283 busses. It has approximately 4,000 employees.

Transcon's balance sheet as of June 30, 1964, shows assets aggregating $26,275,063, consisting of: Current assets $7,859,273, principally cash $860,717, receivables from asso-

ciated companies $5,788,414, accounts receivable $648,333, and material and supplies $430,073; carrier-operating property, less depreciation, $4,942,649; non-carrier operating property, less depreciation, $155,772; intangible property $106,511; investment securities and advances—associated companies $12,373,171 and other $423,960; special funds $240,000; and deferred debits $173,727. Its liabilities were: Current liabilities $5,993,091, chiefly payables to associated companies $3,480,803, accounts payable $1,083,834, wages payable $260,372, and unredeemed tickets $942,767; long-term debt due within one year $885,519; advances payable $10,580; equipment and other long-term obligations $1,865,972; deferred credits $87,827; (5) reserves $365,178; common capital stock $1,974,072 and premiums thereon $366,670; and surplus—unearned $2,970,214 and earned $11,755,940. Transcon's income statements for 1962, 1963, and the first 6 months of 1964 show net income of $1,082,460 and $4,825,765 and a deficit of $332,704, before and net income of $845,117 and $4,452,034 and a deficit of $272,451 (deduction of investment credit of $60,252) after, provision for income taxes, respectively.

No. MC-F-8744 AND FINANCE DOCKET No. 23123

VIRGINIA STAGE'S AND SAFEWAY'S CORPORATE HISTORY, AFFILIATION, OPERATIONS, AND FINANCIAL DATA

Virginia Stage's corporate history, organization, affiliation, and operations are set forth in *National Trailways Bus System—Control—Trailways, supra,* and No. MC-F-8648, *Eastern Trailways, Inc.—Control—Carolina Scenic*

Stages, —— M.C.C. ——, decided July 17, 1964, and, on reconsideration, September 1, 1964. It has outstanding 393,650 shares of common capital stock, par value $1 each, of which WEC (name changed from The Virginia Pepsi-Cola Bottling Company, Incorporated) owns 169,820 shares (43%), Claude A. Jessup 26,970 shares, James L. Jessup 19,500 shares, and other members of the Jessup family own a large part of the balance. WEC is a non carrier, but has real property which is being used by Virginia Stage. The former's capitalization consists of 1,219 shares of 4 percent cumulative preferred stock, $100 par value each, and 791 shares of common capital stock with a par value of $100 each, a majority of which is owned by members of that family.

Safeway's corporate history, organization, affiliation, and operations are described in *National Trailways Bus System —Control—Trailways, supra, Trailways of New England, Inc.—Purchase—Interstate,* 93 M.C.C. 217, and No. MC-F-8745, *Safeway Trails, Inc.—Purchase—Reading Transp. Co.,* decided December 11, 1964 (not printed in full). It has outstanding 525,000 shares each of Class A non-voting and Class B voting common capital stock, par value $1 each. Ownership of a large majority thereof is divided as follows: Virginia Stage, 124,950 shares of each class, total 23.7 percent, Claude Jessup, 122,500 shares, same, 23.3 percent, Transcon 110,600 shares, same, 21.1 percent, Charles B. McInnis 104,600 and 110,600 shares, 20.5 percent, and Marvin E. Walsh 44,450 and 44,450 shares, 8.5 percent.

Virginia Stage and Safeway jointly own all of TNE's capital stock. Virginia Stage, Continental Tennessee Lines, Inc., of Nashville, a subsidiary of Transcon, and Smoky

each owns 33⅓ percent of Tenn T's stock. Virginia Stage, Tamiami Trail Tours, Inc., of Tampa, and Carolina Coach Company, of Raleigh, N. C., jointly control (⅓ each) SCL. Virginia Stage is the sole stockholder of Allentown and Reading Transit Co., Safeway Transit Co., Safety Motor Transit Co., and Lynchburg Transit Co., which provide transit service in Allentown, Pa., Wilmington, N. C., and Roanoke and Lynchburg, Va., respectively. Trailways Service, Inc., and Trailways Terminal of Washington are garage and terminal facilities located in Washington, whose stock is jointly owned by Virginia Stage and Safeway. The former and CCC jointly own Trailways (6) Bus Terminal, Inc., a Richmond, Va., passenger terminal. Trailways Garage of Philadelphia is a garage facility in that city owned by Safeway. The companies named in this paragraph, and not previously identified, will be called in the order mentioned, CT, Tamiami, CCC, ART, ST, SM, LT, TS, TT, TB, and TG.

Virginia Stage operates between Washington, Richmond, Charlottesville, Lynchburg, and Roanoke, Durham, N. C., Huntington, W. Va., and Cincinnati, Ohio. It has 127 buses and 443 employees. Safeway's operations are between New York City and Washington, via Philadelphia and Baltimore, Md., and between Atlantic City, N. J., and Reading and Lancaster, Pa., via Philadelphia and Wilmington, Del. There are 175 busses and 712 employees in its service. TNE operates between Portland, Me., and Berlin and Littleton, N. H., on the north, and New York City, on the south, via Boston and Springfield, Mass., and New Haven, Conn., with 50 busses and 186 employees. Tenn T's operations extend from Roanoke and Bluefield,

W. Va., southwestward to Knoxville, Nashville, and Chattanooga, Tenn., and Atlanta. It has 56 busses. SCL operates 13 busses primarily in Georgia, serving Gainesville and Albany, on the west, and Augusta, Savannah, and Jacksonville, Fla., on the east.

Virginia Stage's balance sheet as of June 30, 1964, shows assets aggregating $8,014,806, consisting of: Current assets $1,358,566, principally cash $177,798, receivables from associated companies $532,868, and accounts receivable, less reserve for uncollectible accounts, $559,194; carrier-operating property, less depreciation, $4,568,313; non-operating property, less depreciation, $221,026; intangible property, less amortization $60,471; investment securities and advances $1,575,687; prepayments $210,358; and deferred debits $20,385. Its liabilities were: Current liabilities $1,156,163, chiefly accounts payable $451,217, taxes accrued $286,869, and other current liabilities $219,429; long-term debt due within one year $741,471; equipment and other long-term obligations $1,750,942; reserves $38,271; common capital stock $393,650 and premiums thereon $586,887; and earned surplus $3,347,422. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $1,013,198, $1,000,293, and $383,528 before, and $563,301, $545,891, and $213,801 after, provision for income taxes, respectively.

Safeway's balance sheet as of June 30, 1964, shows assets aggregating $10,246,493, consisting of: Current assets $1,637,304, principally cash $882,209, receivables from associated companies $225,454, and accounts receivable $454,959; carrier-operating property, less depreciation, $7,902,818; intangible property, less amortization,

$6,090; investment securities and advances $355,427; and deferred debits $344,854. Its liabilities were: Current liabilities $1,520,778, mainly accounts payable $411,183, wages payable $252,665, unredeemed tickets $198,029, taxes accrued $341,728, and other current liabilities $235,430; long-term debt due within one year $870,474; equipment and other long-term obligations $2,089,264; deferred credits $7,174; reserves $52,096; common capital stock—Class A $525,000 and Class B $525,000; and earned surplus $4,656,707. Safeway's income statements for 1962, (7) 1963, and the first 6 months of 1964 show net income of $1,572,688, $1,020,768, and $556,163 before, and $892,930, $682,276, and $314,808 after, provision for income taxes, respectively.

The balance sheet of TNE as of June 30, 1964, shows assets aggregating $2,350,311, including current assets $241,397. Its current liabilities were $457,791 and earned surplus $62,222. Its income statements for 1962, 1963, and the first 6 months of 1964 show a net income of $201,013 and $36,069 and a deficit of $114,728 before, and net income of $189,213 and $33,016 and a deficit of $120,339 after, provision for income taxes, respectively. Tenn T's balance sheet as of June 30, 1964, shows total assets of $1,932,750, including current assets $463,184, and current liabilities of $198,213, with earned surplus of $355,120. Its income statements for 1962 (from January 16), 1963, and the first 6 months of 1964 show net income of $185,694, $226,069, and $128,612 before, and $124,262, $150,363, and $83,995 after, provision for income taxes, respectively. SCL's balance sheet as of December 31, 1963, shows assets aggregating $214,555 and surplus—unearned $46,900 and

earned (debit balance) $33,873. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $141,082, $172,147, and $56,171 before, and $124,345, $78,740, and $30,656 after, provision for income taxes, respectively.

WEC's balance sheet as of June 30, 1964, shows assets aggregating $2,759,154, including current assets $34,964. Its current liabilities were $253,405; capital stock—preferred $248,000 and common $79,100; and surplus—unearned $537,467 and earned $1,611,753. WEC's income statements for 1962, 1963, and the first 6 months of 1964 show net income of $305,431, $202,530, and $30,518, respectively, before provision for income taxes. For 1962 and 1963, net income after such provision was $188,984 and $149,131.

ART's balance sheet as of June 30, 1964, shows total assets of $16,109 and earned surplus (debit balance) $70,872. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $4,042, a deficit of $2,700, and net income of $337, respectively, before provision for income taxes. ST's balance sheet as of the above date shows assets aggregating $104,761 and earned surplus $22,458. Its income statements for the same periods show deficits of $4,977, $15,142, and $11,876. SM's balance sheet as of that date shows total assets of $596,062 and earned surplus of $283,582. Its income statements for these periods show net income, before provision for income taxes, of $20,396, a deficit of $14,047, and net income of $29,217. LT's balance sheet as of the same date shows assets aggregating $1,122,807 and earned surplus $453,226. Its income statements for the same periods show net income of $48,334,

$47,702, and $36,648 before, and $26,800, $27,252, and $22,212 after, provision for income taxes.

(8) TS's balance sheet as of June 30, 1964, shows assets aggregating $883,948 and earned surplus $354,040. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $93,355, $49,825, and $58,079 before, and $49,963, $29,313, and $30,877 after, provision for income taxes, respectively. TT's balance sheet as of the same date shows total assets of $99,499 and capital stock (no surplus) $15,000. Its income statements for the preceding periods show no income or deficits. TB's balance sheet as of that date shows assets aggregating $75,317 and capital stock (no surplus) $40,000. Its income statements for these periods show no income or deficits. TG's balance sheet as of June 30, 1964, shows assets aggregating $267,708 and earned surplus $146,736. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $53,356, $17,830, and $25,645 before, and $29,228, $11,905, and $18,582 after, provision for income taxes, respectively.

AGREEMENTS

Under a tripartite agreement executed on March 26, 1964, by Transcon, Virginia Stage, and WEC, providing for the stockholders of the latter two companies to "become parties hereto and become bound," there would be an exchange of .85 of a share of Transcon's capital stock for each share of Virginia Stage stock; 237.85 shares of its stock for one share of WEC's common stock; and 2.5 shares of its stock for each share of WEC's preferred stock.

Appendix C

Transcon warrants that, when the transactions are consummated, its assets will include all wholly and partially owned subsidiaries appearing on its balance sheet embraced in the 1962 annual report to its stockholders. Each Virginia Stage and WEC stockholder may signify his intention of becoming a party to the agreement by delivering within a stated period (1) an appropriate letter to a named bank which is serving as a depositary and (2) his shares in proper form for transfer. The depositary would issue to him a receipt corresponding to the number of shares delivered to it. The underlying shares may not be withdrawn unless (1) the agreement is terminated at the end of the exchange period because of the failure of the holders of at least 80 percent of each class of stock to participate, or (2) entry of orders by appropriate regulatory bodies approving in substance the considered transactions, or (3) entry of such orders finally denying the applications. Until transfer of the stock to Transcon, the holders of the receipts would have all voting and dividend rights. Within 10 days after the last contemplated order of approval has been entered, Transcon would, by notice to the depositary, designate a day not more than 20 days after such entry as the consummation date. The latter would give notice thereof to each holder of a depositary receipt. Transcon, on or before such date, would deliver to it the specified number of shares for the participating stockholders.

Virginia Stage and WEC agree that they and their wholly-owned subsidiaries will not, without the written consent of (9) Transcon, effect any change in their capitalization; pay any dividends except as specifically noted; dis-

tribute their assets to any stockholder; dispose of or acquire substantial assets, except in the ordinary course of business; sell or lease any of their operating authority, or make expenditures therefor for which they are not committed on the date of the agreement; fail to maintain their property in good order, allowing for reasonable wear and tear resulting from normal operations and losses from fire, theft, collision, or other casualty; fail to maintain their present or comparable insurance coverage; incur any indebtedness other than equipment obligations and current indebtedness in the ordinary course of business; permit encumbrances on operating property except equipment obligations; enter into any contract or lease for a period exceeding six months, except for the delivery of equipment; permit any employment contracts or substantial changes in the compensation of executives or key personnel or payment of bonuses to anyone; permit defaults on any mortgage or other evidence of indebtedness; permit expenditures exceeding $5,000 for capital improvements; fail to operate their property in substantially the same manner as now; and enter into any transaction out of the ordinary course of business. In the event of substantial violation of any of the foregoing covenants, or the institution of a suit in bankruptcy or receivership against Virginia Stage or WEC, or an assignment for the benefit of their creditors, Transcon may terminate this agreement.

Transcon has received a certified balance sheet of Virginia Stage and subsidiaries as of December 31, 1962, and an income statement for 1962 and the same data for WEC. They warrant that there have been no substantially adverse changes since then. Participating stockholders

will effect the resignations of their companies' elected officers and directors as of the consummation date. Before then, they are to receive from the Internal Revenue Service a ruling to the effect that the proposed exchange of stock shall not give rise to recognition of any gain or loss for Federal income-tax purposes. Transcon, before consummation, is not to declare or pay any dividend in the form of its common stock, perform any act, or enter into any arrangement which will substantially dilute the value of such stock.

Under an agreement of April 22, 1964, executed by Transcon, Safeway, and the latter's controlling stockholders, there would be an exchange of .36 of a share of Transcon's capital stock for each share of Safeway's Class A and B capital stock. In most other respects, this agreement and the previous one are basically the same. Nearly all of the involved stock has been deposited in escrow.

To finance the above transactions, Transcon would issue 824,158 shares of its authorized common stock for the participating stockholders' shares apportioned as follows:

(10)

Company	*Outstanding Shares*	*Transcon Shares*
Virginia Stage	393,650	334,603
WEC (preferred)	1,219	3,048
WEC (common)	791	188,139
Safeway (Class A and B)	1,050,000	298,368
Total		824,158

As seen, WEC owns 169,820 shares of Virginia Stage's stock, for which if would receive 144,347 shares of Transcon

stock. Virginia Stage owns 249,900 shares of Safeway's stock, for which it would receive 89,964 Transcon shares. These new 234,311 shares which they would acquire would be returned to Transcon's treasury for cancellation. Thus the latter would need to issue only 589,847 shares. Because of the trade ratios, many of the participating stockholders would be entitled to fractional shares of Transcon's stock. It is anticipated that not more than 500 shares will suffice for this purpose. Authority will be granted to issue not exceeding 590,347 shares.

No. MC-F-8774 AND FINANCE DOCKET No. 23159

QUEEN'S CORPORATE HISTORY, AFFILIATION, OPERATIONS, AND FINANCIAL DATA

GRIC

Queen's corporate history, organization, affiliation, and operations are described in *Queen City Coach Co. and Smoky Mountain Stages—Control,* 50 M.C.C. 325, *Queen City Coach Co.—Control—Smoky Mountain Stages,* 70 M.C.C. 77, and *Eastern Trailways, Inc.—Control—Carolina Scenic Stages, supra.* It has outstanding 22,264 shares of common capital stock without par value. The principal stockholders are Joel W. Wright, Sr., 2,200 shares, James F. Martin 1,364 shares, Guy D. Carpenter 1,350 shares, Elsie E. Love 1,260 shares, Lillian H. Bradley 1,192 shares, C. H. Bost 1,119 shares, E. E. Bost 1,040 shares, and L. A. Love, 1,004 shares. GRIC has some shareholders in common with Queen. A majority of its 7,992 shares of outstanding common capital stock is owned as follows:

Appendix C

Joel W. Wright, Sr., 1,042 shares, James F. Martin 602 shares, Guy D. Carpenter 494 shares, Elsie E. Love 475 shares, L. A. Love 406 shares, C. H. Bost 374 shares, E. E. Bost, 372 shares, W. E. Smith 274 shares, James A. Hardison Estate 259 shares, and H. H. Hardison Estate 243 shares. GRIC, a non-carrier, is an insurance company and owner of real estate used by Queen and its subsidiaries.

Queen is the sole stockholder of Bragg. It owns ⅔ and GRIC ⅓ of the Ga-Fla capital stock. Queen and Transcon jointly control Smoky. Queen and Virginia Stage jointly control Scenic and it, in turn, controls Coastal and Gray. Queen, CCC, and GRIC own, respectively, 50, 25, and 25 percent of the capital stock of Charlotte Union Bus Station, Inc. (CU), (11) a joint passenger station in Charlotte. Asheville Union Bus Station, Inc. (AU), is a joint passenger terminal in Asheville, 45, 45, and 10 percent of whose capital stock is held by Queen, Smoky, and Scenic, respectively. Trailways Bus Depot of Atlanta, Inc. (TA), a joint passenger facility in Atlanta, is owned ⅓ each by Smoky, Tamiami, and Continental Crescent Lines, Inc., the last wholly owned by Transcon. Queen and Tenn T each owns 50 percent of Bristol Trailways Bus Station, Inc. (BT), a joint passenger facility in Bristol.

Queen operates over routes radiating clockwise from Charlotte to Kingsport and Bristol, Tenn., Hickory, Winston-Salem, Greensboro, Durham, Goldsboro, and Wilmington, N. C., Myrtle Beach and Charleston, S. C., Sylvania and Augusta, Ga., Greenwood and Anderson, S. C., and Asheville. It uses 196 busses and has 541 employees. Smoky serves an area bounded generally by

Asheville, Greenville, S. C., Augusta, Athens, and Atlanta, Ga., and Chattanooga, Sweetwater, Knoxville, and Newport, Tenn., with 41 busses and 85 employees. Ga-Fla operates between Augusta and Lake City. Fla., via Waynesboro, Midville, Dublin, and Douglas, Ga., and between Waynesboro and Wadley, Ga., via Louisville, with 10 employees. It neither owns nor leases equipment. Instead, the carrier with vehicles serving its routes charges Queen for their use and the latter, in turn, is reimbursed by Ga-Fla. Bragg's authority is between Fayetteville and Fort Bragg, N. C. It has neither employees nor equipment, the manner of service being similar to that of Ga-Fla. Scenic's operations extended from Asheville, Marion, and Charlotte, N. C., to Orangeburg and Anderson, S. C., and Augusta. Those of Coastal are mainly between Charleston, on the one hand, and, on the other, Myrtle Beach, Camden, and Orangeburg, S. C. Gray provides sightseeing service in the Charleston area.

Queen's balance sheet as of June 30, 1964, shows assets aggregating $6,619,168, consisting of: Current assets $1,051,994, principally cash $158,647, notes receivable $292,948, and accounts receivable, less reserve for uncollectible accounts, $435,983; carrier-operating property, less depreciation, $3,718,635; intangible property $661,280; investment securities and advances—associated companies $287,651 and other $582,308; and deferred debits $317,300. Its liabilities were: Current liabilities $952,761, chiefly accounts payable $266,245, wages payable $274,059, and unredeemed tickets $264,766; long-term debt due within one year $389,587; equipment and other long-term obligations

$1,070,297; common capital stock $1,334,080; and earned surplus $2,872,443. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $1,065,673, $618,625, and $210,013 before, and $870,672, $792,292, and $116,880 after, provision for income taxes, respectively.

Smoky's balance sheet as of June 30, 1964, shows assets aggregating $1,481,571, including current assets $145,358. Its current liabilities were $351,607 and earned surplus (12) $452,952. Its income statements for 1962, 1963, and the first 6 months of 1964 show net income of $185,302, $209,699, and $74,548 before, and $92,233, $129,158, and $48,578 after, provision for income taxes, respectively. The balance sheet of Ga-Fla as of June 30, 1964, shows total assets of $134,430, including current assets $84,701. Its current liabilities were $27,099; common capital stock $137,367 plus premiums and assessments thereon $80,296; and earned surplus (debit balance) $110,332. Its income statement for 1962, 1963, and the first 6 months of 1964 show net income of $17,947 and $592 and a deficit of $5,448 before, and $11,665, $127, and $5,448 after, provision for income taxes, respectively. Bragg's balance sheet as of June 30, 1964, shows total assets of $8,907. Its income statements for the preceding periods show expenses equal to income.

Scenic's balance sheet as of June 30, 1964, shows assets aggregating $1,207,773, including current assets $242,147. Its current liabilities were $559,140 and surplus—unearned $236,992 and earned (debit balance) $417,342. Its income statements for 1962, 1963, and the first 6 months of 1964, show net income of $120,052, a deficit of $231,317, and net income of $49,016, respectively, before provision for income taxes. Coastal's balance sheet as of the above date shows

assets aggregating $163,309. Its surplus was unearned $99,800 and earned (debit balance) $279,538. Coastal's income statements for the preceding periods show net income of $1,877 and deficits of $30,557 and $14,195 respectively, before provision for income taxes. Gray's balance sheet as of that date shows total assets of $80,437 and earned surplus $22,069. Its income statements for the same periods show a deficit of $8,247 and net income of $2,624 and $8,904, respectively, before provision for income taxes. GRIC's balance sheet as of the same date shows assets aggregating $983,208, including current assets $125,263. Its current liabilities were $461,316 and earned surplus $157,850. GRIC's income statements for 1962, 1963 and the first 6 months of 1964 show net income of $12,876, $32,901, and $11,144 before, and $8,209, $22,317, and $7,244 after, provision for income taxes, respectively.

CU's balance sheet as of May 31, 1964, shows total assets of $25,485 and earned surplus (debit balance) $4,456. Its income statements for the years ending July 31, 1962, and 1963, and the period May 31, 1964, show net income, before provision for income taxes, of $518 and $4,068 and a deficit of $4,305, respectively. AU's balance sheet as of October 31, 1964, shows assets aggregating $96,518 and earned surplus $32,729. Its income statements for the years ending October 31, 1962, 1963, and 1964 show net income of $3,739 and $5,772 and a deficit of $3,184, respectively, before provision for income taxes. TB's balance sheet as of June 30, 1964, shows total assets of $863,635 and common capital stock and surplus $261,000. No net income or deficit is recorded on its income statements for 1962, 1963, and the

first 6 months of 1964. BT's balance sheet (13) as of the same date shows assets aggregating $171,385 and earned surplus $11,988. Its income statements for the years ending June 30, 1963 and 1964 show net income, before provision for income taxes, of $1,728 and $390.

AGREEMENTS

Under an agreement executed on May 16, 1964, by Transcon and Queen and the latter's stockholders, Transcon would exchange 7.25 shares of its capital stock for each share of Queen's. The remaining terms are essentially the same as those in the Transcon-Virginia Stage agreement. By another agreement of the same date, to which GRIC's stockholders are parties, Transcon would exchange 7.25 shares of its capital stock for each share of GRIC's. The terms of this and the preceding agreement are otherwise virtually the same. All of the involved stock has been deposited in escrow. Internal Revenue Service has ruled that no gain or loss will be recognized as a result of the exchange of the stock of Virginia Stage, WEC, Safeway, Queen, and GRIC for that of Transcon.

Queen's board of directors, at a meeting held on May 21, 1964, approved employment contracts with L. A. Love, president, and W. E. Smith, chairman of the board. The one with Love, who is 70, provides for a period of 10 years at an annual salary of $20,000 and full-time attention to Queen's business, but half-time after his retirement. If Love is forced into retirement by impaired health, he would receive $6,000 annually. Smith was to continue as chairman of the board and also serve in an advisory capacity at $6,000 per annum. Unfortunately, he has suffered a stroke and is unable to work. There is no basis for a con-

clusion that these contracts are intended as indirect devices for increasing the consideration for the sellers' capital stock. Compare *Dealers Transit, Inc.—Control and Merger,* 87 M.C.C. 571.

To finance these transactions, Transcon would issue 161,414 shares of its stock for the 22,264 shares of Queen's and 57,942 shares for the 7,992 shares of GRIC's or a total of 219,356 new shares. Queen owns 160 shares of GRIC's stock, for which it would receive 1,160 Transcon shares, and 1,000 shares of the latter's stock. These 2,160 shares would be returned to Transcon's treasury for cancellation. Hence, it would need to issue only 217,196 shares. Because of the trade ratios, many of the participating stockholders would be entitled to fractional shares of Transcon's stock. It is expected that no more than 100 shares will suffice for this purpose. Authority will be granted to issue not exceeding 217,296 shares.

(14) Nos. MC-F-8744 and MC-F-8774

Public Interest

As previously noted, Transcon, with its subsidiaries, operates over 45,575 miles of routes in 36 states. Should the instant transactions be approved, it would increase its territorial coverage by 10,860 miles or 23.8 percent in some of these states and in the seven additional states of New England and Delaware. There are several minor duplications in routes and virtually none in service. The carriers to be controlled, directly and indirectly, called the subject carriers, provide through service under pooling arrange-

ments. They assign busses to the pool in proportion to their certificated route miles. If a carrier lacks vehicles, it leases them "by the mile" from the others. Virginia Stage participates with the subject carriers in 35 through-service routes, 10 of which include Transcon, for example, between Boston and Miami, Fla., between New York City and (1) Miami, (2) Atlanta, (3) Memphis, (4) Houston, and (5) Dallas, Tex. Similarly, Safeway participates in 39 through-service routes, 10 of which include Transcon, for instance, between Portland and Washington and between Philadelphia and (1) Birmingham, Ala., and (2) Knoxville. Many of the routes duplicate those of Virginia Stage. TNE is involved in through routes between Portland and Washington, with Safeway as the connecting carrier, and between Boston and Miami, connecting with other TBS carriers. Queen, Smoky, and Ga-Fla participate in the operation of through routes with the subject carriers, including 15 with Transcon, some being duplications of the Virginia Stage and Safeway routes, for example, between New York and (1) Houston and (2) Miami, between Philadelphia and Memphis, between Charleston and Cleveland, between Jacksonville and Chicago, and between Norfolk, Va., and Denver, Colo. From August 1963 through July 1964, Queen derived $2,583,101 from its pooled operations. Transcon participates in 17 through-service routes with the subject carriers, some of which are included in those described above. The number of such routes is being increased.

In the first 6 months of 1964, Virginia Stage billed TBS carriers $1,003,335 for interline service and they recipro-

cated with $376,582. The corresponding amounts with Greyhound are only $45,068 and $44,835. For the months of April, May, and June 1964, Safeway billed TBS carriers $641,734 and they charged it with $855,755 for interstate and intrastate service. The respective sums with Greyhound are merely $4,610 and $9,696. In the last period, TNE billed TBS carriers $88,220 and they reciprocated with $239,469. The corresponding figures with Greyhound are $7,826 and $15,443. Within this period, Queen was billed $374,928 by TBS carriers and $50,895 by Greyhound. It is the policy of the subject carriers to try to retain originated passengers on their lines or on those of other TBS members, unless the passengers' convenience dictates (15) different routes. There are two apparent reasons for this practice, the passenger's comfort by minimization or elimination of interchange and the carrier's profit. It is common knowledge that the cost per bus mile operated decreases with the increase in distance, so that the more revenue a carrier takes in, the greater the net income. Virginia Stage's one-way fare from Washington to Los Angeles, 2,649 miles, is $76.75. If the passenger traveled on its line from Washington to Roanoke, 229 miles, it would receive $6 and the connecting carriers to destination $70.75. Safeway's one-way fare from New York City to Miami, 1,336 miles, is $38.15. If the passenger rode on its line from New York City to Washington, 225 miles, the corresponding division of revenue would be $7.35 and $30.80. TNE's one-way fare from Boston to Houston, 1,856 miles, is $53.25. If the passenger traveled on its line from Boston to New York

City, 216 miles, the similar division would be $6.56 (or less, depending on the gateway used) and $46.69.

Transcon and the subject carriers have cooperated closely for many years, as demonstrated by their pooling programs. They have a vital stake in the continuance and improvement in this service. To illustrate, Safeway derives approximately 85 percent of its revenue from the New York City-Washington operations. Queen's pool operations "produce a higher revenue per bus mile than the other operations." Revenue therefrom for the year ending July 1964 reached $2,583,101. It is estimated that 60 percent of TNE's revenue is earned from its Portland-New York City operations. The present posture of these carriers is nevertheless vulnerable. Certainly each one cooperates when it stands to benefit. When, however, the situation is unfavorable, the action is each to its own. In the summer of 1964, these carriers added a schedule from New Orleans to New York City. Transcon's run from New Orleans to Atlanta was unprofitable. But the connecting subject carriers were earning from minor to major profit. It nevertheless discontinued the run because of lack of financial interest beyond Atlanta. The passenger traffic patterns have changed in recent years from short to long haul. In some areas, the former "has more or less dried up," and it is the latter that "keeps us all going today." With minor exceptions, Transcon does not operate along the Atlantic seaboard. Yet, the traffic generated in this large and populous area is vital to it in order to feed the long-line operations to the west. Centralized control of the subject carriers' operations would enable Transcon to establish sufficient coordinated through schedules, as be-

tween Portland and Lake City, and between Charleston and Los Angeles, to the advantage of the entire system and in the public interest, utilize more efficiently equipment of the latest type and other facilities, and effect economies. Broader territorial coverage and conveniently coordinated through schedules tend to generate additional traffic and to offset in part seasonal fluctuations. Control of the subject carriers would fortify Transcon in facing Greyhound's intensive competition.

(16) PROTESTANTS

GREYHOUND

Greyhound's capitalization, ownership of three carrier and certain non-carrier companies, and operations are described in *California Parlor Car Tours Co.—Pur.—Greyhound,* 93 M.C.C. 392, and *Greyhound Corp. Stock,* 97 M.C.C. 34. It operates through four divisions, Central, Eastern, Southern, and Western, over 92,084 miles of routes serving points in all of the contiguous States, with 5,171 busses and an average of 24,264 employees. Greyhound's consolidated balance sheet as of December 31, 1964, shows assets aggregating $333,681,647, including current assets $89,641,839. Its current liabilities were $60,541,154 and earned surplus $64,801,505. Greyhound's consolidated income statements for 1963 and 1964 show net income of $64,480,949 and $69,101,576 before, and $32,201,317 and $37,679,157 after, provision for income taxes. Greyhound's total revenue per bus mile rose steadily from 44.5 cents in 1954 to 65.3 cents in 1963 and expenses from 28.7 cents to 53.7 cents doubling the favorable difference.

Appendix C

Relating passenger revenue, by exclusion of express and other revenue, to total expenses, produces almost a marginal situation, but is factually incomplete.

As previously noted, some of the subject carriers interchange passengers with Greyhound, but the revenue involved is naturally small when compared with that among the TBS members. The passengers transferred to it are in three categories, (1) those destined to exclusive Greyhound points, (2) those traveling to points at which it has the only direct service, and (3) those for whom it is basically convenient to journey in this manner. In May and June of 1964, Greyhound billed Virginia Stage under (1) $5,294 (49.4% of total) for moving 1,519 interstate passengers; under (2), $1,413 (13.19%) for 308 passengers; and under (3) $4,009 (37.41%) for 482 passengers. The corresponding figures for Safeway in April, May, and June 1964 are (1) $4,613 (59.97%) for 1,291 passengers, (2) $604 (7.85%) for 111 passengers, and (3) $2,476 (32.18%) for 569 passengers. The respective totals of TNE for the same period are (1) $4,862 (38.66%) for 883 passengers, (2) $1,721 (13.68%) for 218 passengers, and (3) $5,994 (47.66%) for 1,193 passengers. The conforming figures of Queen for that period are (1) $35,635 (70.3%), (2) $8,313 (18.1%), and (3) $2,268 (11.6%) (optional honoring).

In 1961, 1962, and 1963, Greyhound received from the subject carriers interline revenue of $548,643, $507,655, and $605,786, respectively, total $1,662,084.[3] Greyhound recipro-

[3] Safeway's employees were on strike from May 17 through June 13, 1963. Bragg does not issue interline tickets. Ga-Fla is included in Queen's account. Smoky's figures for January through March 15, 1961, are not available.

cated with $366,987, $373,717 and $415,134, total $1,155,838. (17) The excess of the amount it received from, to that it gave them, was, in its favor, 49.5 percent in 1961, 35.8 percent in 1962, and 45.9 percent in 1963, total 43.8 percent. In contrast, Greyhound received from Transcon companies $1,105,188, $1,296,138, and $1,333,061, total $3,734,387, and transmitted to them $1,450,534, $1,623,431, and $1,545,885 total $4,619,850. The corresponding margins were 76.2 percent, 79.8 percent, 86.2 percent, total 80.8 percent to its disadvantage. If Transcon, its subsidiaries, and the subject carriers had been part of one system during the first 6 months of 1964, their intercity scheduled vehicle miles would have mounted from 53,947,093 to 77,461,919, an increase of 23,514,826 or 43.6 percent; the corresponding figures for scheduled intercity passenger revenue would have been $20,806,751, $32,860,953, $12,054,202 or 57.9 percent; operating revenues $28,885,365, $44,061,803, $15,176,438 or 52.5 percent; net income before income taxes $751,372, $1,903,706, $1,152,334 or 153.4 percent; and net income after such taxes $303,379, $899,589, $596,210 or 196.5.

Greyhound feels that, if the applications should be approved, "there is a very good possibility * * * that at least the large portion of that traffic (from subject carriers) will be diverted from" it. Compounding this fear is the terminal situation in North Carolina. When any city there is served by two or more passenger carriers, all of them are required by statute to operate out of a joint bus terminal manned by its own personnel. Every terminal is controlled by a board of directors on which each carrier is represented by a member with one vote. The law pro-

vides for fair and impartial operation, and any carrier dissatisfied therewith may file a complaint with the North Carolina Public Utilities Commission, which Greyhound has done as to terminals in Charlotte, Asheville, Raleigh, Fayetteville, and Gastonia. There are eight major terminals in North Carolina, of which Greyhound operates one and the others are controlled by TBS carriers, so that the former does not "have much chance." Conditions are "bad enough today" with relatively short-haul carriers "interested primarily in grabbing * * * whatever traffic they can" for their lines and not quite "as vigorous in taking the traffic that might go beyond their lines * * * but we think it would be a lot worse if Continental (Transcon) were the carrier controlling the stations." Greyhound's revenue per passenger mile averages 2½ cents and the operating cost per mile averages 55 cents. Hence, it must have 22 passengers on a bus to cover the operating cost. When the disparity between cost and revenue "gets close, of course, the loss of one or two passengers can mean the difference between operating in the red or operating in the black."

INVESTORS

Investors is a promoter of business enterprises. It has been trying to penetrate the intercity bus industry since 1963, when it offered to purchase from their stockholders first Queen's shares and later those of Tamiami. By May 4, 1964, Investors (18) concluded that its plans in this respect had advanced to "satisfactory stages of agreement," and so informed Transcon. The latter, however, since 1949, had been discussing with Queen, Virginia Stage, and Safe-

way the desirability of consolidating their operations and those of other carriers so that they "could effect a more competitive situation * * * and render at the same time a more coordinated service to the public." Investor's letter of May 4 was postmarked May 16, New York City, and received by Transcon on May 18. The latter, unaware of the former's existence, much less that it was negotiating for Queen's capital stock, transmitted the last of a series of proposed contracts to five of that carrier's principal shareholders. This instrument, executed May 16, 1964, culminated in the filing of the application in No. MC-F-8774. Before Investors wrote this letter, Transcon issued news releases announcing the agreements involving Virginia Stage and Safeway. That respecting Queen was contained in the release of June 8, 1964. The letter, referring to the Virginia Stage and Safeway acquisitions, states: "On the other hand, it would seem that the antitrust laws most probably will inhibit further acquisitions by your company * * * than those already announced, even though such a further program might be susceptible of ICC approval. Hence we do not believe that the acquisitions we have underway (Queen and Tamiami) should be considered as properly competitive with your own acquisition plans."

When Investors learned of Transcon's agreement with Queen and its stockholders, it instituted lawsuits against them in the District Court of the United States for the Western District of North Carolina.[4] The litigants eventually settled the dispute, or so it seemed, and Investors

---

[4] Civil Action No. 1914, Interstate Investors, Inc. v. L. A. Love, et al., and Civil Action No. 1935, Interstate Investors, Inc. v. Queen City Coach Company and General Realty and Insurance Corporation.

filed a petition to withdraw as protestant in the Commission proceedings.[5] However, shortly thereafter, Investors notified the Commission that plaintiff and defendants had not exchanged "satisfactory releases" and requested that such petition "be held in abeyance until authorization" for processing "is authorized by subsequent letter." In such a letter, by way of clarification, Investors notes that an order of voluntary nonsuit was entered in the above Court. "The collateral matters of releases * * * and documents relating to requiring our withdrawal from subject ICC proceedings were never presented to the District Court in Charlotte. We, of course, shall present them to the District Court in the Southern District of New York in connection with our antitrust complaint against Transcontinental to be filed in the latter court."

(19) CONTENTIONS

Transcon and the principal subject carriers contend that the transactions are consistent with the public interest, and should therefore be approved, on the following grounds: (1) The consideration for the sellers' capital stock is reasonable; (2) the operations of Transcon and the subject carriers are complementary; (3) numerous savings would be effectuated following consummation; (4) improved through service would benefit the public and strengthen Transcon's position as Greyhound's competitor; (5) the latter's claim that the centralized operations would divert much traffic from it is completely unfounded, since it is by

[5] Received February 23, 1965.

far the dominant carrier in the industry; (6) the terminal situation in North Carolina has a statutory basis and that State's Public Utilities Commission can be depended on to enforce the law and protect any aggrieved party; (7) Investors, a non-carrier, is a frustrated bidder for Queen's capital stock whose case is based on accusations and innuendo; (8) the depositary receipts are not securities unlawfully sold to the public; and (9) approval herein would create a duopoly, thereby increasing competition. The principal cases cited in support of the foregoing contentions are *Transamerican Freight Lines, Inc.—Purchase—Gorman,* 5 M.C.C. 712, *Greyhound Corp.—Control—Florida Motor Lines Corp.,* 45 M.C.C. 83, *Trailways of New England, Inc.—Purchase—Interstate,* 93 M.C.C. 217, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, *West Coast Bus Lines Common Carrier Application,* 41 M.C.C. 269, *Greyhound Corp.—Control—Southeastern Greyhound Lines,* 57 M.C.C. 123, *Transcontinental Bus System, Inc.—Control—Continental,* 50 M.C.C. 193, and *Pacific Greyhound Lines—Purchase—Oregon Motor,* 59 M.C.C. 657.

Greyhound argues that the transactions are contrary to the national transportation policy because (1) the volume of available traffic does not warrant the establishment of another single-line operation between Maine and Florida; (2) such service would enable Transcon to divert long-haul traffic, in view of the North Carolina Terminal problem; (3) there is no need for that service; and (4) the facts of record justify a finding that change in control of the subject carriers has already been accomplished without the Commission's approval. To support its position, Greyhound cites *Associated Transport, Inc.—Purchase—Russell,*

Appendix C

55 M.C.C. 177, *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M.C.C. 341, *Denver-Chicago Trucking Co., Inc. —Pur.—Boulder Truck*, 70 M.C.C. 309, *Super Service Motor Freight Co., Inc.—Pur.—Hayes Frt.*, 60 M.C.C. 389, and *Greyhound Corp.—Control—North Coast Transp. Co.*, 55 M.C.C. 801 (not printed in full).

Greyhound requests the following findings:

(1) A consolidation of rights which would result in a single-line service from Maine to Florida is unquestionably a new service.

(20) (2) The fact that applicants have failed to introduce any traffic figures reflecting interchange amongst them raises the presumption that the proposed consolidations would result in a new and different service.

(3) Applicants failed to introduce any evidence which would establish that a need exists for the tremendous new single-line operations here proposed.

(4) The proposed transactions threaten extensive passenger traffic losses to Greyhound.

(5) The national transportation policy requires preservation of a sound passenger system by bus.

(6) The facts of record in these transactions warrant a finding that control of vendors may already have passed to Continental without approval of the Commission.

Investors maintains that the applications should be denied as not in the public interest for the reasons that: (1) The interstate scheduled bus industry "has great need of the development of at least a third major, national competitor," and the Commission "has the obligation to

nurture competition" therein; (2) "it would appear to be the grossest breach of public trust for the Commission to take action * * * that would reduce competition and resultant adequacy of service to the public;" (3) authority to grant immunity from the antitrust law "is not the equivalent of release from the need to consider the economics of monopoly and duopoly;" (4) there is not a "single bit of evidence from independent or public interest sources or economists skilled in transportation matters introduced at the hearings by the applicants," and the Commission "has been derelict in its obligation to protect the public interest by failing to have economic material as to the competitive structure in the industry inserted into the record;" (5) the sale of depositary receipts for the stock of Queen and GRIC by several holders was made in a suddenly contrived market without filing a registration statement with the Securities and Exchange Commission; and (6) the Examiner's "rulings limiting and excluding evidence relating to the economics of monopoly and duopoly and economic alternatives" are "clearly erroneous." Investors relies on *McLean Trucking Co.* v. *United States,* 321 U. S. 67, *Kobe* v. *Dempsey Pump,* 97 F. Supp. 342, and *U. S.* v. *General Electric Co.,* 82 F. Supp. 753, to sustain its postulates.

Discussion and Conclusions

Before delving into the merits of the issues, it is advisable to dispose of some preliminary matters. On September 1, 1964 in No. MC-F-8648, *Eastern Trailways, Inc.—Control—Carolina Scenic Stages,* —— MCC. ——, Queen

and Virginia Stage were authorized to acquire joint control of Scenic, and, in turn, of Coastal and Gray, through purchase of (21) its capital stock. At the opening of the initial hearing, Transcon moved that the last three carriers be added to others herein of which it would acquire indirect control. The Examiner granted the motion, subject to publication of notice in the Federal Register. There is no protest to the amendment. Since Transcon filed identical amendments in both section-5 proceedings, the titled application, to the extent of the amendment, will be dismissed. Tenn T having been included as a subject carrier in both proceedings, the application in No. MC-F-8774 will be dismissed as to it. Virginia Stage, Tamiami, and CCC jointly control (⅓ each) SCL. Should the transactions in No. MC-F-8744 be consummated, Transcon would own merely ⅓ of the latter's stock. SCL was included as a subject carrier "out of an abundance of caution," but "no control will actually be obtained" by Transcon. Tamiami and CCC are not subject carriers. There is merit in this position, and the application will be dismissed in this respect. Compare Finance Docket No. 21755, *Missouri Pac. R. Co.—Control—Chicago & Eastern Ill. R. Co.*, —— I.C.C. ——, decided February 16, 1965. WEC, a noncarrier, owns 43 percent of Virginia Stage's stock. Following consummation in No. MC-F-8744, the former would own approximately 5 percent of Transcon's capital stock, making it the fifth largest stockholder. However, WEC would turn these shares into Transcon's treasury for cancellation, and consequently would cease to be a stockholder of Virginia Stage. WEC was likewise made a party out of an abundance of caution. The application will accordingly

be dismissed as to it. The Stock of Ga-Fla is owned ⅔ by Queen and ⅓ by GRIC, and Queen has exclusive control of that carrier. GRIC is a non-carrier, and also was included as a party in No. MC-F-8774 out of an abundance of caution. Hence the application will be dismissed in this respect. On the penultimate day of the continued hearing, Investors moved that the Commission appoint and assign an economist to assist and advise the Examiner in developing for the record "material relating to monopoly aspects of this acquisition of control." The Examiner denied the motion, but it was placed before Commissioner Tuggle, Chairman of Division 3, who, the next day, "orally denied the request * * * orally to argue * * * the merits" of the motion.

The exchange of Transcon's stock for that of Virginia Stage, WEC, Safeway, Queens City, and GRIC is based on "earnings ratio," including that of subsidiaries. In the case of the last two companies, their net income of 1963, after income taxes, was used and that of 1962 for the three others. While the negotiations contemplated an "earnings ratio," the final figures vary somewhat therefrom because differences mainly in methods of depreciation and investment credit necessitated relatively minor adjustments. Thus, the Transcon-Virginia Stage earnings ratio of .83:1 was increased to a trade ratio of .851, WEC (common) from 237.56.1 to 237.85:1, Safeway from .34:1 to .36:1, and Queen-GRIC from 7.18:1 to 7.25:1. Transcon's net book value per share advanced from $11.04 in 1962 to $12.59 in 1963. After elimination of inter-company ownership, Virginia Stage's net book value per share as of December 31, 1962, was (22) $14.51; the exchange rate multi-

plied by Transcon's 1962 net book value was $9.38; thus, the excess of the net book value per share received by the latter over that of the surrendered shares is $5.13. The amounts relating to Safeway are $5, $3.97, and $1.03; Queen $198.98, $91.28, and $107.70; GRIC $36.67, $91.28, and $54.61 debit balance);[6] and WEC common $4,427.36, $2,625.86, and $1,801.50, and preferred $93.66, $27.60, and $66.06. To portray a clear and convincing picture of the advantages of the proposed transactions, Transcon assumes merger into itself of the five last named companies as of December 31, 1963, with the following results: Its net worth, excluding intangibles, would have increased by 41 percent, operating revenues and net income after income taxes 37 percent, total assets 40 percent, long-term debt 34 percent, miles operated 35 percent, earnings per share 11 percent, and net book value per share, excluding intangibles, 15 percent. Since only control is involved here, the results would obviously be less impressive. They nevertheless do support the proposition that the stock exchange is reasonable. Some of the monetary and service benefits would be largely realized in either event, such as savings from mass purchasing of busses and supplies, joint advertising, effective utilization of equipment, low inventory, centralized accounting, reduced insurance premiums, and coordination of schedules in the larger interest of through, rather than local, service. As only an exchange of stock is involved in these transactions, no fixed charges would be incurred. As of June 30, 1964, Transcon's capitalizable assets substantially exceeded its capitalization. It would finance the transactions

---

[6] Combined with Queen's excess, there is a surplus of $53.09.

through the issuance of not more than 807,643 shares of stock having an aggregate par value of $807,643, and its investments in subsidiaries would be increased by a like amount. The net book value of the stock to be acquired, except GRIC's, exceeds that issued therefor. It is accordingly obvious that Transcon has sufficient capitalizable assets to support the proposed increase in its capitalization.

Expansion of territorial coverage tends to attract additional passengers, making for a higher load factor per bus. The savings to which reference has been made are many, ranging from $2.50 on 1,000 baggage checks to $1,100 on each engine. Coordinated schedules for the enlarged area would expedite and improve the through service provided by the involved carriers. In the first 6 months of 1964, Virginia Stage and TBS carriers billed each other a total of $1,379,917, while that with Greyhound was $89,902. Safeway's corresponding amounts for April, May, and June 1964 are $1,497,489 and $14,306. During the same period, the respective figures for TNE are $327,689 and $23,269. Within this period, Queen was billed $374,928 by TBS carriers and $50,895 by Greyhound. It is clear from these comparisons that the latters's interline revenue with these carriers is of no material significance when contrasted with that resulting from their interchange with other TBS carriers. (23) In 1961-3 Greyhound received from the subject carriers interline revenue aggregating $1,662,084 and reciprocated with $1,155,838, the margin in its favor being 43.8 percent. Contrariwise, it received from Transcon carriers a total of $3,734,387 and paid them $4,619,850, for a deficit of 19.2 percent. The passengers transferred to Greyhound are classified into three categories: (1) Those destined to ex-

clusive points, (2) those destined to points at which it has the only direct service, and (3) those for whom it is convenient to journey in this manner. Analysis of Virginia Stage tickets honored by Greyhound reveals that the latter billed the former in May and June of 1964 amounts representing 49.4 percent in category (1), 13.19 percent in (2), and 37.41 percent in (3). The corresponding percentages with Safeway for April, May, and June of 1964 are 59.97, 7.85, and 32.18. The respective figures with TNE in the same period are 38.66, 13.68, and 47.66. The conforming percentages with Queen for that quarter are 70.3, 18.1, and 11.6. The revenue in category (1) cannot be diverted from Greyhound; that in (2) would be less vulnerable than is apparent, since passengers subjected to unduly circuitous routing or transfer at connecting points, when through service over direct routes is available by another carrier, are unlikely to patronize the first carrier; the revenue in (3) would be in jeopardy, but it is only 37.41 percent of the total with Virginia Stage, 32.18 percent with Safeway, 47.66 percent with TNE, and 11.6 percent with Queen. It is important to note that the entire revenue with the first three carriers is $30,986 compared with Queen's $46,215.

In 1963, the passenger revenue of all Class I intercity bus carriers reached $408,975,000, with Greyhound accounting for 63 percent of the total, TBS members 23 percent, and others 14 percent. Assuming approval of the transactions, Transcon carriers' proportion of the total would have been 18 percent and Greyhound's 63 percent. Based on total revenue of $527,820,000, the corresponding percentages would have been 18 and 61. Had the subject carriers been merged into Transcon as of December 31, 1963,

the latter, subsidiaries included, would have owned assets aggregating $77,188,125 or 28 percent of Greyhound's $278,909,171, recorded net worth 23 percent of the latter's, and owned 2,052 busses against Greyhound's 5,000. If these merged carriers had operated during 1963, they would have earned net income, after income taxes, of $7,141,746 or 22 percent of Greyhound's $32,201,317 and operated 184,900,000 bus miles versus the latter's 514,000,000. Greyhound "last year extracted profits at a rate few companies in the transportation business can even approach, much less match. At $28 million, or $2.01 per share, total net profit amounted to a whopping 19% return on stockholders' equity. * * * In recent years Greyhound has been generating enough cash * * * to reduce long-term debt a dramatic 65% since 1958. In 1961 they prepaid $11 million in equipment obligations coming due in the next three years, enabling Greyhound to get free of equipment debt to banks for the first time in a quarter of a century." Forbes, May 1, 1963, p. 20. Transcon is the only bus carrier which "even remotely (24) approaches Greyhound in size. * * * But under the steady hand of President Maurice E. Moore, Transcontinental, too, makes a good thing of the bus business. It does so despite the fact Moore operates at a clear disadvantage in one crucial respect: Few of his routes cover the populous Atlantic seaboard and Northeast, areas of heavy traffic and relatively high fares. Thus, Transcontinental's load factor (i.e., percentage of seats occupied) was just 40% last year (vs. Greyhound's 55%), and Transcontinental got far less revenue per bus-mile operated." Ibid. p. 23. Greyhound is the sole real competitor of Transcon and the subject carriers.

Appendix C

Greyhound is emphatic in pointing to "the failure on the part of applicants to introduce any exhibits reflecting the amount of interline traffic which they have handled in any joint operations they may perform." In the face of this failure, "applicants must establish by substantial probative evidence that a need exists for the institution of what in effect would be a new service," as is evident from the cases it previously cited. This allegation is not quite correct, and so lacks merit. There are five exhibits which show pooling of busses and revenue in the rendition of through service in which (1) the subject carriers participated, (2) they and other TBS members, except Transcon carriers, joined, and (3) all such carriers participated.[7] Queen derived $2,583,101 in revenue from pool operations from August 1963 through July 1964. Greyhound's own exhibits demonstrate that its interchange with the subject carrier in 1961-3 amounted to $2,817,922 and with Transcon carrier $8,354,237.[8] Other exhibits compare interline revenue during stated periods between Virginia Stage, Safeway, TNE, and Queen, on the one hand, and, on the other, (1) TBS carriers and (2) Greyhound.[9] Regarding the North Carolina terminal situation, assuming, *arguendo,* that Greyhound is at a disadvantage there, it did not adduce any evidence by which to measure the actual or potential loss of revenue. Greyhound "admits that its overall operations have been somewhat successful in the last several years." but the "profit is not from strict passenger operations." It is true that Greyhound's excess of passenger revenue other

---

[7] Nos. 48, 87, 94, 124, and 160.
[8] Nos. 151-3.
[9] Nos. 50, 89, 96, and 128.

expenses is minimal, but when its revenue from express, charter operations, locker rentals, and commissions is included, as it should be, because of the direct relationship to transportation, the excess of total revenue over expenses mounted to 11.1 cents per bus mile in 1962 and 11.6 cents in 1963. Moreover, no consideration is being accorded to the insurance, leasing, and other enterprises of which Greyhound has recently acquired control. The variety of financial and operating data discussed in detail earlier herein is convincing that Greyhound is the dominant (25) for-hire motor-bus carrier of passengers on the national scene. Approval of the transactions would extend Transcon's operations, through the subject carriers, into the northeastern seaboard and would intensify, not create, competition there and in other areas of the country. Compare *Greyhound Corp.—Control—Florida Motor Lines Corp., supra.* There is little likelihood that Greyhound's operations would be jeopardized thereby. Compare *Trailways of New England, Inc.—Purchase—Interstate, supra.*

Investors, at the hearing, pitched its position on two principal points, (1) its prior purchase of Queen's capital stock, and (2) Transcon's duopoly in violation of the antitrust laws. On brief, Investors addresses itself primarily to point (2). Hence, it is sufficient to conclude that Investors' alleged purchase of Queen's capital stock and the claimed advantages to itself and the public which would result therefrom may not properly be considered in the absence of an appropriate application. *Pacific Greyhound Lines—Purchase—Oregon Motor,* 59 M.C.C. 657, and *Atlantic Greyhound Corp.—Purchase—Gilmer,* 45 M.C.C. 670. The present "is no time to set up a duopoly pat-

tern" in the scheduled intercity bus industry, which "would reduce competition and resultant adequacy of service to the public." There is great need for the "development of at least a third major, national competitor," and the Commission "has the obligation to nurture" such competition. Authority to grant immunity from the antitrust "laws is not the equivalent of release from the need to consider the economics of monopoly and duopoly. Also the Commission has been derelict in its obligation to protect the public interest by failing to have economic material as to the competitive structure in the industry inserted into the record." Taking the last allegation first, it is sufficient to note that there is no law requiring the Commission to develop such material for the record. Compare *Broth. of Maint. of Way Employees* v. *United States,* 221 F. Supp. 19. The Commission, however, favors the establishment of an Economic Counsel and supporting staff.[10] The President's budgets for fiscal years 1963-4 provided for it, but Congress failed to appropriate any funds therefor. In the landmark case of *McLean Trucking Co.* v. *United States, supra,* the Supreme Court declared:

> • • • there can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were ap-

[10] Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 88th Cong., 1st Ses., Part I, pp. 454 and 477-8, and Part 11, pp. 1264, 1266-7, 1282-6, and 1294-6, and Hearings before a Subcommittee on Appropriations, House of Representatives, 88th Cong., 1st Ses., Part I, pp. 385 and 413-6.

propriate for effectuation of the national transportation policy. It was informed that this policy would be (26) furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate mergers from the requirements of those laws. Section 5(11) * * * Against this background, no other inference is possible but that, as a factor in determining the propriety of motor carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.

* * * * *

Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. * * * Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors, and on the general competitive situation in the industry in the light of the objectives of national transportation policy.

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.[11]

From the cases and articles just cited and *Florida East Coast Railway Company* v. *United States,* 242 F. Supp. 14, it is apparent that the Commission is "required to accommodate section 5(2) and the antitrust legislation[12] due to the presence of the section 5(11) exemption and the history of the development of the national transportation policy." 242 F. Supp. 18. But it need accord weight to "antitrust policy in a section 5(2) (27) proceeding only if the merger has the probable anti-competitive effect proscribed by section 7 of the Clayton Act. More specifically, when the effect of a proposed merger 'may be substantially to lessen competition' or 'to tend to create a monopoly,' in 'any line of commerce in any section of the country,' the prohibition of the Clayton Act must be given weight. Conversely, when the proposed merger would not so result, the Commission is not required to give weight to anti-trust policy." Ibid. p. 20. Assuming, *arguendo,* that approval of the transactions will result in a monopoly and lessening of

---

[11] See also *Minneapolis & St. Louis R. Co.* v. *U. S.,* 361 U.S. 173, Carl H. Fulda, "Antitrust Considerations in Motor Carrier Mergers," 56 Mich. Law Rev. 1237, and G. E. and Rosemary D. Hale, "Competition or Control III: Motor Carriers," 108 U. Pa. Law Rev. 775.

[12] Sherman and Clayton Antitrust Acts.

competition, the advantages to the public of through service in an enlarged territory, reduction of the imbalance in the flow of traffic, more effective utilization of equipment and facilities, improvements in safety programs, and substantial savings in operating costs are consistent with the public interest and "will assist in effectuating the over-all transportation policy." Actually, no monopoly would emerge from such approval, as the statistics detailed before and those below demonstrate. The facts here are different from those in the case last cited, where the court noted the Commission's recognition that "the merger would supplant the duopoly with a rail Monopoly." Ibid. 22.[13] Here, on the contrary, broadly speaking, a duopoly would supplant a monopoly in intercity passenger transportation. From the facts already presented, it is not unfair to characterize Greyhound as a Giant and Transcon as a Dwarf. Passenger carriers' operating revenues in 1963 reached $758,904,000 and Class I intercity motor carriers $609,756,000. I.C.C. 78 Ann. R. 34, 127, 153.[14] Their operating ratio was 86.76. Ibid. p. 153. The revenue from all modes of transportation, by percent, accrued as follows: Motor carriers for hire 2.63, private automobile 89.69, airways 5.12, rail and electric railways 2.23, and inland waterways 0.33. Ibid. p. 34. These percentages prove that the private automobile, in the aggregate, is the monopolist in

---

[13] "At most, the rail monopoly that would result from the merger in portions of Florida would merely supplant the duopoly which has long existed there." *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 165.

[14] Exhibit 76 shows total operating revenues of $527,829,000, but there is no indication that the discrepancy affects the percentage allocated to each mode.

passenger transportation. However, in competition for the motor-carriers' for-hire portion, Greyhound is, and will remain, even after approval of the transactions, as the data adduced demonstrate, the Giant of intercity bus transportation.

Investors wishes to create a "third force," beginning with Queen and Tamiami, to compete with Greyhound and Transcon. In this endeavor, it sought, during the hearing, the help of the Antitrust Division of the Department of Justice, the Securities and Exchange Commission, and even the Interstate Commerce Commission. The record shows that the Examiner gave it every (28) opportunity in this respect, but it was unsuccessful. Investors persistently maneuvered to introduce evidence regarding its attempt to purchase Queen's capital stock, after it was permitted to outline briefly the facts of the situation and the Examiner made it clear that the Commission would not resolve its dispute with Queen and Transcon, a matter for settlement among themselves or in court. In both instances, the Examiner found it necessary, several times, to admonish Investors' witness, its president and counsel of record, to desist from offering irrelevant and cumulative evidence of the type which the Examiner stated he would not admit in evidence. In connection with the "third force" as an alternative to the proposed duopoly, he asked such questions and made such comments as:

> I want to ask this witness (of Transcon) whether this group as a third force in the industry would constitute a viable efficient economic unit. • • •

• • • • • • • • •

Appendix C

I am asking a theoretical question.

* * * * * * * * *

I am saying there would be equal economies in other relationship.

* * * * * * * * *

I have got to keep it theoretical.

* * * * * * * * *

Can you describe to us what the criteria would be for developing a third marketable security in the intercity bus business.

I am trying to prove that there is economic damage to Tamiami and Carolina Coach that will develop.

It should be noted that Tamiami and CCC, whom Investors was trying so zealously to protect from "economic damage" did not see fit to intervene in these proceedings. The Examiner's rulings rejecting the kind of evidence encompassed in this paragraph is considered by Investors as "clearly erroneous." For refusing to make available Economic Counsel at the hearing, the Commission is charged with being "derelict in its obligation to protect the public interest." The explanation made earlier and below establishes conclusively that Investors' position is groundless.

The question of the "third force" has an interesting aspect. Investors summoned as its witness the chairman of the board of directors of Stone and Webster Service Corporation, (29) herein called SWS, utility consultants, a subsidiary of Stone and Webster, Inc. In April of 1963, SWS, on its own initiative, completed a study of the feasibility

and benefits of consolidating into one company the eastern members of TBS, mostly the subject carriers, CCC, and Tamiami. The study concluded that "you could get much better efficiency in one big operating unit than you can in ten smaller ones, no matter how closely they tried to operate." Representatives of the involved carriers discussed the conclusions and recommendations of the study at two open meetings, but nothing materialized. The "problem was getting the owners of all these companies in the same frame of mind at the same time. * * * and they had a group of owners that couldn't quite agree to go ahead with this deal." Thus, the "third force" upon which Investors harped so much could not even get off the ground, according to its own witness. It would be futile and inexcusable to burden the record with the theoretical and remote possibility of a "third force" under the circumstances of this case. As the Examiner stressed at the hearing, the Commission "has no application * * * for any form of approval as a result of that study, and the Commission can only act on matters before it." The instant transactions are evidenced by duly executed contracts which have not been rescinded or invalidated by a mutual act of the parties thereto. So long as this is true, and in the absence of a request by the contracting parties for dismissal of the applications, "we are required by the plain language of the statute to determine" same on their merits. Compare *Marion Trucking Co., Inc.—Purchase—Harwood Trucking,* 50 M.C.C. 613, 621, and *Black Ball Freight Service* v. *United States,* 223 F. Supp. 191, 197. Several of Queen's and GRIC's stockholders sold their depositary receipts in a "contrived market * * * without

the filing of a registration statement for at least the shares of General Realty with the SEC," without "full disclosure." If they did make such disclosure, "how would they obtain a sutainable non-taxable ruling from the IRS * * *?[15] Regardless of the form of Investors' clever phraseology, it is, in effect, alleging violations under two separate statutes, yet the Examiner has not been informed of any charges filed with the Securities and Exchange Commission and Internal Revenue Service. Suffice it to say that the depositary receipts are subject to the terms of the related agreements, including the ratios of exchange, and that the number of shares sold does not affect the control (30) of Queen and GRIC. In October of 1963, Transcon purchased for cash from a brokerage firm 21 percent of Safeway's stock. The facts of record do not warrant a finding that Transcon thereby acquired the power to exercise control or management of Safeway's operations. On July 12, 1965, in No. MC-F-9165, Greyhound filed a complaint and request for investigation, alleging that Transcon, directly or indirectly, and without the Commission's approval, has acquired a substantial portion of Queen's stock and consequently "may have

---

[15] Western Sales, Limited, a Bahamian corporation, herein called Western, was a wholly-owned subsidiary of Transcon in 1964, when the latter distributed 51 percent of the shares to its own stockholders, retaining the balance. Western is a designer and seller of buses. It wholly owns the stock of Bus & Car Company, S. A., of Les Bruges, Belgium, a manufacturer of the Gold and Silver Eagle busses. It wholly owns the stock of Bus & Car Company, S. A., of Highway Insurance Company, A. G., of Zug, Switzerland, which is authorized to write all types of insurance outside of that country. It has purchased depositary receipts representing 1,387 Queen shares and 829 GRIC shares.

acquired actual control over the operations of said carrier. That there is a strong possibility that similar control may have been acquired by said persons of the operations of Virginia Stage Lines, Inc. and Safeway Trails, Inc." Transcon has filed an answer denying these allegations. It and subsidiaries filed a complaint and request for investigation on April 27, 1965, in No. MC-F-9102, alleging that Greyhound "has taken unlawful control" of another motor carrier of passengers. Nothing herein shall be construed as prejudging the issues in the last two proceedings.

It is Transcon's intention to maintain the subject carriers as separate corporate entities with the same management. In the words of its president: "Well, we have felt that our system of decentralized management and operation and ownership was more effective * * * than if we had a centralized management that has been adopted in Greyhound. We feel that the local approach to knowing what is going on in the territory by management people is much better." When reminded of the Commission's policy of encouraging corporate simplification, he remarked that "we will abide by the Commission's rulings. But, on the other side, we do feel that our policy is right." Transcon's judgment merits respect, but it is nevertheless true that corporate simplification does not exclude decentralized management and operation, and that the reasons advanced for approval of the transactions are likewise valid for such simplification. It is recommended that Transcon re-examine its policy.

The Examiner rejects Greyhound's requested findings, except Nos. 3 and 5. In connection with No. 3, he observes

that Transcon met its burden by establishing that the transactions are consistent with the public interest.

Ultimate Findings

Upon consideration of all the evidence of record, the Examiner finds:

(1) In No. MC-F-8744, that acquisition by Transcontinental Bus System, Inc., of control of Virginia Stage Lines, Incorporated, and Safeway Trails, Inc., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., Tennessee Trailways, Inc., and Service Coach Line, Inc., through such acquisition of control, upon the terms (31) and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitute transactions within the scope of section 5(2)(a), and will be consistent with the public interest; *provided, however,* that if the authority herein granted is exercised, jurisdiction shall be reserved for a period of three years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representatives, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transactions under the authority herein granted.

Appendix C

Application dismissed as to Carolina Scenic Stages, Coastal Stages Corporation, The Gray Line of Charleston, and Water Street Equity Corporation.

(2) In No. MC-F-8774, that acquisition by Transcontinental Bus System, Inc., of control of Queen City Coach Company through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., Fort Bragg Coach Company, Inc., and Carolina Scenic Stages, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston through such acquisition of control, upon the terms and conditions previously set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; *provided, however,* that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of three years from the date of final consummation herein to make such additional findings and to impose such terms and conditions with respect to the employees of applicant and its affiliated companies as may be necessary and lawful, if, upon petition by them, or their representatives, within that period, it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as a direct result of, consummation of the transaction under the authority herein granted.

Application dismissed as to Service Coach Line, Inc.; Tennessee Trailways, Inc., and General Realty and Insurance Corporation.

(3-4) In Finance Dockets Nos. 23123 and 23159, that issuance by Transcontinental Bus System, Inc., in connection with the transactions authorized in Nos. MC-F-8744 and MC-F-8774, not exceeding 590,347 shares and 217,296 shares of its common capital stock, $1 par value each, respectively, upon the terms and conditions and for the purposes previously set forth, (a) is for a lawful object within its corporate purposes and (32) compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by Transcontinental Bus System, Inc., of service to the public as a common carrier, and which will not impair its ability to perform that service and (b) is reasonably necessary and appropriate for such purposes.

ORDER

Premises considered, it is the ORDER of the Hearing Examiner that:

(1) In No. MC-F-8744, acquisition by Transcontinental Bus System, Inc., of Dallas, Tex., of control of Virginia Stage Lines, Incorporated, of Charlottesville, Va., and Safeway Trails, Inc., of Washington, D. C., through purchase of their outstanding capital stock, and, in turn, of Trailways of New England, Inc., of Washington, Tennessee Trailways, Inc., of Knoxville, Tenn., and Service Coach Line., of Tampa, Fla., through such acquisition of control be, and it is hereby, approved and authorized, subject to the terms and conditions herein set forth.

The application, to the extent Carolina Scenic Stages and Coastal Stages Corporation, of Spartanburg, S. C., The

Gray Line of Charleston, of Charleston, S. C., and Water Street Equity Corporation, of Charlottesville, are joint parties applicant, be, and it is hereby, dismissed.

(2) In No. MC-F-8774, acquisition by Transcontinental Bus System, Inc., of control of Queen City Coach Company, of Charlotte, N. C., through purchase of its outstanding capital stock, and, in turn, of Smoky Mountain Stages, Inc., Georgia-Florida Coaches, Inc., and Fort Bragg Coach Company, Inc., all of Charlotte, and Carolina Scenic Stages, and, in turn, of Coastal Stages Corporation and The Gray Line of Charleston through such acquisition of control, be, and it is hereby, approved and authorized, subject to the terms and conditions herein set forth.

The application, to the extent Service Coach Line, Inc., Tennessee Trailways, Inc., and General Realty and Insurance Corporation are joint parties applicant, be, and it is hereby, dismissed.

(3-4) In Finance Dockets Nos. 23123 and 23159, in connection with the transactions authorized in Nos. MC-F-8744 and MC-F-8774, Transcontinental Bus System, Inc., be, and it is hereby, authorized to issue not exceeding 590-347 shares and 217,296 shares of its common capital stock, $1 par value each, respectively, for the purposes all upon the terms and conditions set forth herein.

If the parties to the transactions authorized in Nos. MC-F-8744 and MC-F-8774 desire to consummate same, they shall confirm in writing to the Commission, immediately after consummation, the dates on which consummation has actually taken place.

(33) If the authority herein granted is exercised, Transcontinental Bus System, Inc., shall submit for consideration, in each proceeding, a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

The authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this Recommended Order has become the order of the Commission.

Unless the authority herein granted is exercised within 180 days from the date of service of such notice or order, this order shall be of no further force and effect.

Except as otherwise authorized, the stock authorized to be issued in Finance Dockets Nos. 23123 and 23159 shall not be sold, pledged, repledged, or otherwise disposed of by Transcontinental Bus System, Inc., unless and until so ordered or approved by the Commission.

Transcontinental Bus System, Inc., shall report concerning the matters involved in Finance Dockets Nos. 23123 and 23159 in conformity with the order of the Commission, Division 3, dated May 20, 1964, respecting applications filed under section 214 of the Interstate Commerce Act (49 CFR 56.6).

Nothing herein contained shall be construed to imply any guarantee or obligation as to said stock, or dividend thereon, on the part of the United States.

Appendix C

The recital in said report of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, M. L. Winson, Hearing Examiner.

Dated at Washington, D. C., this 19th day of October, 1965.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

Statutes Involved

Motor Carrier Act of August 9, 1935, ch. 498, § 202(a), 49 Stat. 543:

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Interstate Commerce Act of September 18, 1940, ch. 722, Title I, § 1, 54 Stat. 899:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the

provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act § 5(2)(a)(b)(c), 49 U.S.C. § 5(2)(a)(b)(c):

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire con-

trol of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed

transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Interstate Commerce Act § 5(4), 49 U.S.C. § 5(4):

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or

to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

Interstate Commerce Act § 5(11), 49 U.S.C. § 5(11):

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority;

and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Clayton Act § 7, 15 U.S.C. § 18:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and

no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier, from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the

company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securitie and Exchange Commission in the exercie of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Clayton Act § 11(a)(b), 15 U.S.C. § 21(a)(b):

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers

engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in

which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Appendix D

18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1505:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place,

conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1621:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Appendix D

Internal Revenue Code of 1954, § 368 (a)(1)(B):

(a) Reorganization.—

(1) In general.—For purposes of parts I and II and this part, the term "reorganization" means—

* * *

(B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition);

APPENDIX E

Initial Brief of Applicant Prior to Examiner's Report and Recommended Order, Filed in the Commission on January 25, 1965, pp. 77-93 (R. 53).

INFORMATION CONCERNING PRIOR ACQUISITIONS OF GREYHOUND

Name	*Remarks*	*Date*	*Citation*
Illinois Greyhound Lines, Inc.	100% Stock	1/ 1/36	1 M.C.C. 78
Ohio Greyhound Lines, Inc.	100% Stock		
Teche Lines, Inc.	78.77% Stock		
Pacific Greyhound Lines, Inc.	60.95% Stock		
Dixie Greyhound Lines, Inc.	57.08% Stock		
Atlantic Greyhound Lines, Inc.	56.03% Stock		
Richmond Greyhound Lines, Inc.	51% Stock		
Central Greyhound Lines, Inc.	50% Stock		
Pennsylvania Greyhound Lines, Inc.	50% Stock		
Capitol Greyhound Lines	50% Stock		
Northland Greyhound Lines, Inc.	45.11% Stock		
Southwestern Greyhound Lines, Inc.	16.67% Stock		
Western Greyhound Lines, Inc.	79.31% Stock		
Atlantic Greyhound Corporation	56.03% Stock	11/27/36	1 M.C.C. 342
Southwestern Greyhound Lines, Inc.	67.67% Stock		
Capitol Greyhound Lines, Inc.	100% Stock		

Appendix E

78

Name	*Remarks*	*Date*	*Citation*
Ohio Greyhound Lines, Inc.	100% Stock		
Illinois Greyhound Lines, Inc.	100% Stock		
Richmond Greyhound Lines, Inc.	51% Stock		
Dixie Greyhound Lines, Inc.	100% Stock		
New England Greyhound Lines, Inc.	100% Stock		
Oliver Coach Lines, Inc.	Purchased by Dixie Greyhound	11/23/37	5 M.C.C. 211
Red Star Way, Inc.	Portions purchased by Ohio Greyhound Lines	6/14/38	5 M.C.C. 607
White Star Motor Lines of Illinois	Portions purchased by Illinois Greyhound Lines	9/23/38	15 M.C.C. 86
Peninsula Transit Corporation	Portions purchased by Capitol Greyhound Lines	12/27/38	15 M.C.C. 459
Quaker Stages, Inc.	Portions purchased by The Greyhound Corporation	12/30/38	15 M.C.C. 533
Old Colony Coach Company	100% Stock		
New England Trans. Co.	Portions purchased by New England Greyhound Lines	12/30/38	15 M.C.C. 536
Victoria Coach Co., Inc.			
Berkshire Motor Coach Lines, Inc.			

Appendix E

79

Name	*Remarks*	*Date*	*Citation*
Independent Bus Corporation E. O. Woodie Trans. Company	Purchased by Atlantic Greyhound Lines	3/22/39	25 M.C.C. 1
Central Greyhound Lines Northland Greyhound Lines	55% Stock 55% Stock	4/ 6/39	25 M.C.C. 59
Hiawatha Trails, Inc. Sioux Limited Lines Northwestern Motor Bus Grey Transportation	Portions purchased by Northland Greyhound Lines	4/17/39	25 M.C.C. 109
Lee Way Stages	Portions purchased by Southwestern Lines	5/23/39	25 M.C.C. 195
Stokes Bus Line	Purchased by Atlantic Greyhound Lines	8/31/40	35 M.C.C. 679
Canadian Greyhound Lines, Ltd. Toronto Greyhound Lines, Ltd.	51% Stock 51% Stock	7/10/40	35 M.C.C. 599
Teche Greyhound Lines	Merged	2/ 3/41	36 M.C.C. 397
Eastern Michigan Motor Buses Eastern Michigan Trans. Co.	Control	2/ 4/41	36 M.C.C. 413
Peninsula Transit Corporation	Merged with Richmond Greyhound Lines	6/ 9/41	36 M.C.C. 747

Appendix E

80

Name	*Remarks*	*Date*	*Citation*
Lee Way Stages	Portions purchased by Southwestern Greyhound Lines	6/11/41	36 M.C.C. 753
New Mexico Transportation Co.	45% Stock—Southwestern Greyhound Lines		
Pacific Southland Stages, Inc.	Merged with Pacific Greyhound Lines	12/12/41	37 M.C.C. 654
Taho Greyhound Lines			
Champlain Bus Corp.	Purchased by Central Greyhound Lines	12/ 3/42	38 M.C.C. 777
Carolina Motor Bus Lines	Portions purchased by Atlantic Greyhound	2/10/43	39 M.C.C. 31
Chillicothe-Jackson Coach Co.	Purchased by Atlantic Greyhound	7/ 6/44	39 M.C.C. 819
Pan American Bus Lines	Purchased by Atlantic Greyhound	2/20/42	38 M.C.C. 433
Orange Lines	Purchased by Northland Greyhound Lines	11/16/45	40 M.C.C. 295
Cincinnati and Lake Erie Trans. Company	30.57% Stock	10/16/45	40 M.C.C. 338
Penn-Ohio Stage Lines	Control	12/11/45	40 M.C.C. 388
Valley Public Service			
Balcher Bros. Motor Coaches	Purchased by Great Lakes Greyhound Lines	1/ 1/45	40 M.C.C. 804

Appendix E

81

Name	*Remarks*	*Date*	*Citation*
Foster Bus Lines	Purchased by Great Lakes Greyhound Lines	3/15/45	40 M.C.C. 815
Florida Greyhound Lines	Control	11/30/45	40 M.C.C. 802
Enders Bus Lines, Inc.	Merged with Central Greyhound Lines, Inc.	7/23/46	45 M.C.C. 33
White Star Coach Lines	Portions purchased by Central Greyhound		
Cincinnati and Lake Erie Trans. Co.	100% Stock	10/ 4/46	45 M.C.C. 143
Springfield-Delaware Bus Company			
Hamilton City Lines			
Lima City Lines, Inc.			
Community Transit Lines	Purchased by Atlantic Greyhound Lines	6/12/47	45 M.C.C. 670
Thendors Bus Lines	Portions purchased by Atlantic Greyhound		
Southern Kansas Greyhound Lines	50% Stock	6/20/47	45 M.C.C. 679
Southern Kansas Lines	Portions purchased by The Greyhound Corporation		
Interstate Transit Lines	Portions purchased by Northland Greyhound Lines	9/20/46	45 M.C.C. 808
Westbridge Trans. Co.	Control	10/10/46	45 M.C.C. 804
Buffalo and Erie Coach Corp.			

Appendix E

82

Name	*Remarks*	*Date*	*Citation*
Washington Motor Coach Company	Control	2/ 3/47	45 M.C.C. 821
Blackhawk Motor Transit Company	Purchased by Illinois Greyhound Lines	4/ 1/47	45 M.C.C. 820
White Bus Lines	Portions purchased by Central Greyhound Lines	10/10/47	50 M.C.C. 807
O.C.&N. Stages, Inc. Inland Stages	Merged with Pacific Greyhound Lines	11/19/47	50 M.C.C. 123
King Brothers Company	Purchased by Great Lakes Greyhound	12/ 8/47	50 M.C.C. 237
Northeastern Missouri Greyhound Lines	Purchased by Southwestern Greyhound Lines	2/31/48	50 M.C.C. 441
Elmira-Ithaca Trans. Company	Purchased by Central Greyhound Lines	2/ 3/48	50 M.C.C. 818
North Star Lines	Purchased by Central Greyhound Lines	4/21/48	50 M.C.C. 821
Yellow Bus Lines	Purchased by Great Lakes Greyhound	8/24/48	50 M.C.C. 831
*Central Greyhound Lines *Great Lakes Greyhound Lines *Illinois Greyhound Lines *Ohio Greyhound Lines	Merged with the Greyhound Corporation	11/16/48	55 M.C.C. 237
*Central Greyhound Lines	100% Stock		

* Entries marked with an asterisk are not included in the total of 121 cited p. 7n.**, *supra,* because Greyhound had already acquired control of these companies through other transactions reflected in this listing.

Appendix E

83

Name	*Remarks*	*Date*	*Citation*
Oregon Motor Coaches	Joint control by Pacific Greyhound Lines and The Greyhound Corporation	12/31/48	55 M.C.C. 321
North Coast Transportation Company	Purchased by the Greyhound Corporation	10/ 8/48	55 M.C.C. 801
Midland Coach Lines	Purchased by Northland Greyhound Lines	5/20/49	55 M.C.C. 804
Bellville-St. Louis Coach Co.	Purchased by Dixie Greyhound Lines	5/15/49	55 M.C.C. 819
*Dixie Greyhound Lines *Florida Greyhound Lines *North West Greyhound Lines *North Coast Greyhound Lines	Merged with The Greyhound Corporation	11/29/49	56 M.C.C. 238
West Ridge Transportation Company	Merged with The Greyhound Corporation	3/20/50	56 M.C.C. 349
Buffalo and Erie Coach Company	Purchased by Central Greyhound Lines		
Central Coach Lines, Inc.	Purchased jointly by The Greyhound Corporation and Indiana Greyhound Lines	9/ 5/50	57 M.C.C. 33

Appendix E

84

Name	*Remarks*	*Date*	*Citation*
*Southeastern Greyhound Lines	Merged with The Greyhound Corporation	10/ 3/50	57 M.C.C. 123
Alaga Coach Lines and Southeastern Greyhound of Indiana	Control by Greyhound Corporation		
Ernest R. & Archie C. McLaughlin	Purchased by The Greyhound Corporation	1/15/51	57 M.C.C. 806
W. J. Foster	Purchased by New England Greyhound Lines	2/13/51	57 M.C.C. 807
Charlestown Bus Line & Equipment Co., Inc.	Portion purchased by The Greyhound Corporation	1/24/51	57 M.C.C. 803
Walter M. & Paul Fulkenhagen	Purchased by Northland Greyhound Lines	4/23/51	57 M.C.C. 807
Triangle Transportation Co.	Portion purchased by Northland Greyhound Lines	4/23/51	57 M.C.C. 807
Airline Bus Company	Purchased by Pacific Greyhound Lines	8/20/51	57 M.C.C. 808
Southeastern Greyhound Lines of Indiana	Merged with The Greyhound Corporation	6/ 7/51	57 M.C.C. 808
Alaga Coach Line	Merged with The Greyhound Corporation	10/ 3/51	58 M.C.C. 804

Appendix E

85

Name	*Remarks*	*Date*	*Citation*
Olot M. Lundquist	Purchased by Northland Greyhound Lines	9/24/51	58 M.C.C. 804
Sun Valley Bus Lines	Portion purchased by Pacific Greyhound Lines	11/27/51	58 M.C.C. 806
Harold A. & Orville T. Stoy	Purchased by Pacific Greyhound Lines	2/14/52	58 M.C.C. 807
Interstate Transit Lines, et al.	Control by and merged with The Greyhound Corporation	7/30/52	58 M.C.C. 809
Robert H. Finley	Purchased by Northwestern Missouri Greyhound Lines—Control by Southwestern Greyhound Lines and Greyhound Corporation	8/26/52	58 M.C.C. 810
*Interstate Transit Lines, Inc.	Merged with The Greyhound Corporation	11/28/52	58 M.C.C. 811
Oregon Motor Stages	Purchased by Pacific Greyhound Lines	12/22/53	59 M.C.C. 657
International Coach Lines, Inc.	Purchased by New England Greyhound Lines	12/22/53	59 M.C.C. 806
B. C. Motor Transportation, Ltd.	Portion purchased by The Greyhound Corporation	11/26/54	60 M.C.C. 643

Appendix E

86

Name	*Remarks*	*Date*	*Citation*
Pennsylvania Greyhound Lines	Control by and merged with The Greyhound Corporation	5/10/54	60 M.C.C. 803
Pennsylvania Greyhound Lines of Virginia and Pennsylvania Greyhound Lines of Indiana	Control by The Greyhound Corporation		
Capital Greyhound Lines	Control by The Greyhound Corporation	11/ 3/54	60 M.C.C. 804
New England Greyhound Lines	Merged with The Greyhound Corporation	11/10/54	60 M.C.C. 804
Southern Limited, Inc.	Control by and merged with The Greyhound Corporation	12/21/54	60 M.C.C. 804
Golden Gate Transit Lines	Purchased by Pacific Greyhound Lines	7/ 6/55	65 M.C.C. 347
Penn Bus Co.	Control by and merged with The Greyhound Corporation	4/26/55	65 M.C.C. 804
The Blue Ridge Transportation and White Star Lines, Inc.	Purchase by the Greyhound Corporation	4/26/55	65 M.C.C. 804
Maine Central Transportation Co.	Control by and merged with The Greyhound Corporation	4/ 5/56	65 M.C.C. 804

Appendix E

87

Name	*Remarks*	*Date*	*Citation*
*Capitol Greyhound Lines	Merged with The Greyhound Corporation	3/24/55	65 M.C.C. 809
West Virginia Transportation Co.	Purchased by Capitol Greyhound Lines and Atlantic Greyhound Corporation	9/29/55	65 M.C.C. 809
*Central Greyhound Lines of New York	Merged with the Greyhound Corporation	10/10/55	65 M.C.C. 810
Gulf Transport Company	Portion purchased by The Greyhound Corporation	5/31/56	65 M.C.C. 815
*Northland Greyhound Lines	Merged with The Greyhound Corporation	6/25/56	65 M.C.C. 816
*Pacific Greyhound Lines	Merged with the Greyhound Corporation	7/30/56	70 M.C.C. 59
California Parlor Car Tours, Company	Control by The Greyhound Corporation through the merger		
Boston & Maine Transportation Company	Portion purchased by The Greyhound Corporation	4/ 1/57	70 M.C.C. 801
Eastern Canadian Greyhound Lines, Ltd.	Purchase by The Greyhound Corporation	10/ 7/57	70 M.C.C. 806
Auto Interurban Company	Portion purchased by The Greyhound Corporation	10/10/56	70 M.C.C. 811

Appendix E

88

Name	*Remarks*	*Date*	*Citation*
*Southwestern Greyhound Lines	Merged with The Greyhound Corporation	7/ 8/58	75 M.C.C. 339
*Northeastern Missouri Greyhound Kerrville Bus Lines	Control by The Greyhound Corporation		
*Atlantic Greyhound Corporation	Merged with The Greyhound Corporation	6/15/59	80 M.C.C. 802
*Greyhound Lines, Inc.	Took over all interstate rights of Greyhound Corporation.	10/25/63	93 M.C.C. 392

Transcontinental is but a stripling compared with Greyhound, either in years or in size. Formed in 1947, it too has grown by means of acquisitions. The route system of Continental Trailways is depicted in Exhibit No. 1. According to Greyhound's Exhibit No. 148, Transcontinental's route system presently encompasses 45,575 certificated miles. After consummation, that same exhibit shows that Transcontinental would have a total of 56,435 route miles, or an increase of 23.8%. Greyhound is saying, in effect, that a 23.8% increase, all at one time, is just too much to allow one of its competitors to have, even though it has done that and more a number of times in the past. Below is presented a chart which shows the growth of Transcontinental since 1947, by way of acquisitions.

INFORMATION CONCERNING PRIOR ACQUISITIONS OF TRANSCONTINENTAL

Name	*Remarks*	*Date*	*Citation*
Bowen Motor Coaches	Acquired by Lone Star Coaches, Subsequently to become Continental Bus System, Inc.	9/ 1/44	39 M.C.C. 832
Panhandle Stages, Inc.	Joint control by Lone Star Coaches A. F. Heckett	10/ 8/46	45 M.C.C. 809
Continental Bus System, Inc.	Formerly Lone Star Coaches Direct control by Transcontinental	2/10/48	50 M.C.C. 193, 305
Continental Panhandle Lines, Inc.	Formerly Panhandle Stages, Incorporated—Joint Control by Transcontinental and A. F. Heckett		58 M.C.C. 801
Texas, New Mexico and Oklahoma Coaches, Inc.	Dismissed. 39% held not to constitute control		
Union Bus Lines, Inc.	Dismissed. 30% held not to constitute control.		
Central Division of Transcontinental	Formerly Santa Fe Trail Transportation Company	2/10/48	50 M.C.C. 193, 305
Dixie Division of Transcontinental	Formerly Dixie Motor Coach Corporation		58 M.C.C. 801
Western Division of Transcontinental	Formerly Santa Fe Trail Transportation Company		

Name	*Remarks*	*Date*	*Citation*
Southern Kansas Greyhound Lines, Inc.	Joint control by Transcontinental and The Greyhound Corporation		
West Coast Bus Lines, Ltd.	Dismissed. 30% held not to constitute control		
Continental Pacific Lines, Inc.	Formerly West Coast Bus Lines, Ltd. Direct control by Transcontinental	5/20/48	50 M.C.C. 525
Rocky Mountain Division of Continental Bus System	Formerly Rio Grande Motorway, Inc.	7/24/52	55 M.C.C. 31, 235 58 M.C.C. 801
Denver-Colorado Springs-Pueblo Motorway, Inc.	Joint control by Continental Bus System, Inc. and Burlington. Indirect control jointly by Transcontinental and American Buslines, Inc.	7/24/52	55 M.C.C. 31, 235 58 M.C.C. 801
Continental Southern Lines, Inc.	Formerly Southern Bus Lines, Inc. Direct control by Transcontinental	8/19/49	56 M.C.C. 803
Valley Transit Lines, Inc.	Direct control by Transcontinental	8/29/52	58 M.C.C. 805
American Buslines, Inc.	Direct control by Transcontinental	5/ 7/53	59 M.C.C. 233, 250
Gibson Lines	Indirect control through American		

Name	*Remarks*	*Date*	*Citation*
Muscatine, Davenport and Clinton Bus Company	Indirect control through American		
Denver-Salt Lake-Pacific Stages, Inc.	Joint control with American		
Denver-Colorado Springs-Pueblo Motorway, Inc.	Joint control with American		
Continental Crescent Lines, Inc.	Formerly Crescent Stages, Inc. Indirect control through Continental Southern Lines, Inc.	10/13/53	59 M.C.C. 491
Continental Tennessee Lines, Inc.	Formerly Central Bus Lines, Inc Indirect control through Continental Southern Lines, Inc.	10/13/53	59 M.C.C. 805
Smoky Mountain Stages, Inc.	Joint control by Transcontinental and Queen City Coach Company	8/29/56	70 M.C.C. 77
Union Bus Lines, Inc. Randolph Field Bus Company, Inc.	Indirect control through Continental Bus System, Inc.	1/19/56	65 M.C.C. 803
Bayshore Buslines, Inc.	Indirect control through Continental Southern Lines, Inc.	5/10/55	65 M.C.C. 805

Name	*Remarks*	*Date*	*Citation*
Arkansas Motor Coaches, Ltd., Inc.	Direct control by Transcontinental	10/4/56	70 M.C.C. 809
*American Buslines, Inc. *Gibson Lines *Muscatine Davenport & Clinton Bus Company *Denver-Salt Lake-Pacific Stages, Inc. *Denver-Colorado Springs-Pueblo Motorway, Inc.	Joint control by Transportation Properties, Inc. and Continental Southern Lines, Inc. during Chapter X Reorganization	9/10/58	75 M.C.C. 471
Denver-Colorado Springs-Pueblo Motorway, Inc.	Direct control by Transcontinental	5/10/60	85 M.C.C. 383
Denver-Salt Lake-Pacific Stages, Inc.	Direct control by Transcontinental	5/10/60	85 M.C.C. 383
Continental Crescent Lines, Inc. Continental Tennessee Lines, Inc.	Direct control by Transcontinental Direct control by Transcontinental	5/18/60	Not Printed
*American Buslines, Inc. *Gibson Lines *Muscatine, Davenport & Clinton Bus Company	Indirect control through Continental Southern Lines, Inc.	8/ 4/60	85 M.C.C. 628
Midwest Buslines, Inc.	Indirect control through American Buslines, Inc.	10/25/60	Not Printed

* Entries marked with an asterisk are not included in the total of 34 cited p. 7n***, *supra,* because Transcon had already acquired control of these companies through other transactions reflected in this listing.

Name	*Remarks*	*Date*	*Citation*
Tennessee Trailways Inc.	Formerly Tennessee Coach Company. Joint control by Virginia Stage Lines, Incorporated, Continental Tennessee Lines, Inc. and Smoky Mountain Stages, Inc. Indirect control by Transcontinental and Queen City Coach Company	12/21/61	87 M.C.C. 775
*American Buslines, Inc.	Direct control by Transcontinental	12/29/61	87 M.C.C. 795
*Gibson Lines	Indirect control through American		
*Muscatine, Davenport & Clinton Bus Company	Indirect control through American		
*Midwest Buslines, Inc.	Direct control by Transcontinental		
*Randolph Field Bus Company, Inc.	Direct control by Transcontinental		
*Denver-Salt Lake-Pacific Stages, Inc.	Direct control by Transcontinental		
*Union Bus Lines, Inc.	Direct control by Transcontinental		

* Entries marked with an asterisk are not included in the total of 34 cited in footnote * * * to p. , *supra,* because Transcon had already acquired control of these companies through other transactions reflected in this listing.

APPENDIX F

Joint Brief of the United States of America and the Interstate Commerce Commission, Filed in the Court below on May 11, 1967, p. 40 n. 16 (R. 54).

Upon receipt of plaintiff's brief in February of 1967, making serious charges of fraud, "counsel for the Commission and for the United States examined the matter and were advised of the likelihood that Transcon's counsel, Goff, and its Secretary-Treasurer Hamilton had personally participated in the purchase of the receipts by the subsidiary. This was subsequently confirmed by Mr. Goff, who further stated that to the best of his knowledge all the purchases were made by himself, or by Hamilton, or by Scheitel, or by Robinson. In our view it certainly would have been preferable had this information been made available at the hearing, even though it was not material to the ultimate decision. However, the Commission was fully aware that the subsidiary which was controlled by Transcon had acquired the receipts and it attributed the purchases to Transcon. It nevertheless approved the transaction as consistent with the public interest. Thus, the identity of the Transcon officers involved in the purchases of the receipts by the subsidiary was immaterial to the Commission's decision.

Transcon's Answering Brief, Filed in the Court Below on May 12, 1967, pp. 25-26 (R. 57)

Indeed, within a week following the hearings, the General Counsel of Transcon, Mr. Goff, furnished representatives of the Commission's Bureau of Enforcement, upon the latter's inquiry, with all records concerning Highway's purchases

of depositary receipts. Stock purchases were made by Messrs. Goff or Hamilton or Scheitel or Robinson. There was no reason to withhold disclosure of Highway's acquisition of rights to less than 10% of Queen stock and of rights to less than 2% of Virginia stock; nor was there any occasion to disclose these acquisitions. Transcon had made no secret of its 1963 acquisition of 21% of Safeway and no one at the hearings, including Interstate ever challenged such acquisition as being unlawful. Obviously, if either Greyhound or Interstate or the Hearing Examiner thought that the acquisition of 21% of Safeway was of no significance, they would certainly not attach any significance to the acquisition of 2% of Virginia or less than 10% of Queen. (Footnote omitted.)

Transcript of Hearing Before the District Court, May 25, 1967, pp. 115-116, 126 (R. 67)

Judge Feinberg: And the question posed by plaintiff is assuming that he had answered it that way, would that have made any difference to the Interstate Commerce Commission and shouldn't this Court consider carefully whether the Interstate Commerce Commission would have reached the same conclusions if it had received more candid answers?

Mr. Castles: I think there is just no question whatsoever that if there put on the record here, as it was subsequently before the examiners report came out, exactly what these purchasers had been the result would have been exactly the same and I say that because the pattern of sales that were actually made show that there was no agreement. The prices were different from each other. The sales were for different (116) amounts. There was no constant relation-

ship between the price paid for the depository receipts and the market price of Transcontinental stock. These things were all clearly ad hoc arrangements and, as you heard the Interstate argument this morning, they said that the key to all this is that letter of April 28th where Queen wrote a letter to Transcontinental and that I had said that one of the integral conditions of your sale is that you would buy back the Transcontinental stock at $31.25 or something which came out to $250 a share of Queen stock.

If you look at the sales, your Honor, it shows that $250—that the prices ranged all over the place. They ranged from $241.25 to $290, and I prepared for the Court a schedule which contains the dates, the prices, the amounts and the individual sellers of each and every one of these transactions comprising the 2,004 shares which I'd be happy to hand up to the Court. (See attached.)

• • • •

(126) Judge Feinberg: Aren't you concerned about less than candid testimony?

Mr. Nelson: Very much so, your Honor. As a matter of fact, I'm the one that ran into this matter of who the four people were. It is through our efforts that the matter is here. We wanted it here. We wanted the Court to see it. We insisted on it.

Now, it is our position on this that we are not vouching for the credibility of the testimony of the witnesses insofar as they gave testimony which may be read as denials of knowledge of purchases. If the testimony can be read that way, and some of it can, it is false, and it is clearly false as to Sheitel who is named as one of the four people that did the buying. There is no question about that. The question is what does this all mean?

QUEEN DEPOSITORY RECEIPTS SOLD TO HIGHWAY

SELLER	DATE OF SALE	TOTAL SHARES OWNED	SHARES SOLD	PRICE/SHARE PAID BY TRANSCON	PRICE/SHARE RECEIVED BY SELLER	TOTAL PAID BY TRANSCON	TRANSCON STOCK PRICE BID	TRANSCON STOCK PRICE ASKED	VALUE OF TRANSCON STOCK	DISCOUNT TO HIGHWAY
Mrs. J. E. Cross	6/15/64	66	66	$290		$19,206	43	43¼	$311.75	7%
Mrs. M. Rowland	6/15/64	339	312	$290		$90,480	43	43¼	$311.75	7%
Bruce Love	7/ 1/64	315	48	$265	$260	$12,720	42¼	42¾	$309.43	11%
Susan Hardison	7/ 1/64	409	20	$260		$ 5,200	42¼	42¾	$309.43	11%
H. H. Hardison, Sr.	7/ 1/64	736	173	$260		$64,980	42¼	42¾	$309.43	16%
A. M. Hardison	7/ 1/64	417	40	$260		$10,400	42¼	42¾	$309.43	16%
Goodbody & Co. (believed to be James F. Martin)	7/22/64	1364	300	$250		$75,000	40½	41	$293.63	15%
L. A. Love, Sr.	7/24/64	1004	296	$250	$247.50	$74,000	40½	42¾	$293.63	15%
Goodbody & Co. (believed to be James F. Martin)	8/21/64	1364	50	$250		$12,500	41½	42½	$300.88	17%
H. H. Hardison, Jr.	9/ 4/64	537	82	$260	$245	$21,238	37¼	37¾	$270.06	5%
Bruce Love	12/ 4/64	315	32	$267	$265	$ 8,560	41½	42	$300.88	12%
L. A. Love, Jr.	12/28/64	350	85	$252		$21,420	39½	40	$286.38	12%
H. H. Hardison, Jr.	1/ 8/65	537	300	$241.25		$72,375	39½	40	$286.38	16%
Goodbody & Co. (believed to be James F. Martin)	8/23/65	1364	200	$250		$50,000	37⅞	38⅛	$274.23	17%

APPENDIX G

Transcript of Hearing Before Examiner, pp. 200-04, 851-53, 865, 971-73 (R. 53).

Scheitel (200-04):

(200) Q. Has Transcontinental at any time advised people where, the shareholders where they could find a market for the depository receipts? A. Yes, sir. The depository receipts were issued on the basis that they were marketable, and if they could find a market, fine.

Q. Did Transcontinental advise them where they could find such a market? A. We told them that they should go to their brokers.

Q. Did you suggest the name of a broker? A. We suggested the possibility of Goodbody and Company, that made a market in Transcontinental stock, might be interested, yes, sir.

Q. Have you made any back-up arrangement with Goodbody and Company? A. No, sir.

Q. Is there any privity between Goodbody and any stockholder or director of Transcontinental? A. No, sir.

Q. And, to your knowledge, have the trust receipts been marketed? A. I understand, I think somebody sold, yes.

Q. Was it a part of your prior negotiations on the consider- (201) ation that there would be such a market? A. No, sir.

Q. Did you suggest that there would be a discount on the marketed price in relation to Transcontinental shares? A. That is strictly between the broker and them.

Q. Do I answer your—you at no time told Mr. L. A. Love or any member of the Love family that the discount would be ten to fifteen percent over the market price of

Transcontinental shares? A. If we were asked, we were advised as to what the market situation would be. I don't know what the market situation would be.

Q. You at no time discussed with any member of the Love family, or any other principal stockholder—there are five principal stockholders of Queen—the relative amount of discount that would be available to them at Goodbody and Company, that it would be ten or fifteen percent over the equivalent market price of shares of Transcontinental Bus System? A. I don't—we didn't even—there wasn't any assurance on our part at all that there was going to be a market for the depository receipts.

Q. You did refer them to Goodbody & Company? A. I said that Goodbody & Company possibly could make a mar—might find an investor for them if they wanted to sell.

(202) Q. You had no prior discussions with Goodbody & Company before you pointed them to Goodbody & Company? A. I did not.

Q. Nor anybody on the Board of Transcontinental Bus System? A. No, sir, not to my knowledge.

Q. But you are aware that some had been sold, so that the list of shareholders appended to the contract may be a different list than the people who actually take up the Transcontinental shares? A. It may be.

Q. And you had no conversations with people about the discount? It was not a part of the consideration, the persuasiveness to take your deal, that those who wanted cash could get cash from Goodbody & Company? A. No, sir.

Q. Why would you select Goodbody & Company out of all the brokerage firms in the southeastern United States?

A. It just happens to be one I know that makes a market in Transcontinental stock.

Q. Well, if—you will concede that if this transaction is not approved by the Commission, what Goodbody & Company is making a market in is not Transcontinental stock, but in Queen City stock, for which there is no market? A. I don't know that they are making a market in Queen City stock.

(203) Q. But you know that some has been sold? A. I don't know who bought it.

Q. Pardon me? A. Queen City—repeat your question, please.

Q. You know that some has been sold? A. I was told some was sold.

Q. You say there was no part of your prior discussions with the selling—holding shareholders that there would be a market for their trust receipts provided by Goodbody & Company? A. No, sir.

Q. I asked you, how did you select the name Goodbody & Company? A. I just told you. It is one that I know makes a market in Transcontinental stock, and we told them that they possibly would find them an investor that wanted to invest in this stock.

Q. But you concede that the trust receipts, if the Commission does not approve this transaction, will result in Goodbody & Company having made a market in Queen City shares rather than Transcontinental Bus shares? A. They will own Queen City shares, or whoever bought them will own Queen City shares. I am sure they acted as agent.

I don't know anthing about the brokerage business. I

don't think they can make a market in Queen City shares. It is (204) not a listed stock. I don't know.

Q. But the name Goodbody & Company came from you? A. Yes.

Mr. Callaway: Mr. Examiner, this gentleman has testified over and over and over.

Exam. Winson: Yes. It is getting to be an argument.

Mr. Burt: No, I just wanted to try—

Exam. Winson: He is answering you.

Q. (By Mr. Burt) You did say before that until the Commission approves this, you are not in control of Queen City? A. Definitely not.

Q. Letters and telegrams were addressed to the shareholders and directors of Queen City, and then you answered them, your company answered those letters, is that true? A. As I recall, we had a letter, a copy of a letter from you addressed to Mr. Moore in Dallas.

Q. Well, I will show you this letter here.

Mr. Burt: Would you mark it as an exhibit?

Mr. Goff: Counsel, I don't know that these questions should be directed to this witness. I wrote that letter, and my signature is on it.

Mr. Burt: Well, this applies to negotiations and whether control—I am not getting into—this is off the record?

Exam. Winson: Off the record.

(Discussion off the record.)

* * * * * *

Love (851-53, 865):

(851) (By Mr. Burt) Mr. Love, at any time—oh, back on the subject of the conditions, and so on, the prerequisite conditions to the executing of the contract at 7.25 to one. To your knowledge, sir, did any of the shareholders want cash and not 7.25 shares to one? A. I don't believe I know of any of them that took that. Some of them have sold some of their depository receipts.

Q. Did they want any assurance that there would be a market for the depository receipts? A. No, sir, not that I know of.

Q. Were you ever told that there would be a market for the receipts that you took? A. No, sir, I wasn't told definitely there would be any market for them.

Q. Was it formerly suggested to you by anyone that somebody might be willing to buy some at a ten percent discount over the market price of Transcontinental shares the day you tendered them? A. I don't recall. I taken that up with those people in Charlotte myself.

Q. Mr. Love, did you happen to select the First Securities (852) Corporation yourself? I mean, how did you happen to go tender this unknown document? A. Bruce Love sold a few of his shares to them. I think he knew one of the fellows that worked there with them.

Q. And they said that they would make a market in these shares? A. They said they thought they would have a market for them in a few days, and give them the price I'd take for it and give them a few days and they'd have a market for it.

Q. They had a market. Did they tell you, indicate where they were getting a market for it? A. No, sir, they did not.

Q. To your knowledge, had any of the shares of Queen City ever been traded, changed hands except through a death in a family, we will say, for many years? A. What?

Q. For many years, had any of the shareholdings of Queen City, as shown on this list here, to your knowledge, had there been any substantial or any transfers of shares amongst the shareholders to outsiders or amongst themselves, except as a result of death? A. Since the trade was made?

Q. No, sir. We will say ten years prior to May 16th. A. No, I don't believe there have.

Q. So there has been no trading in the shares of Queen City? (853) A. I don't believe so.

Q. Had you taken the shares of Queen City to a bank to borrow on them, or to sell them, would there have been any knowledge about what they were worth?

Mr. Goff: On whose part?

The Witness: I don't know of anybody that put any up.

Q. (By Mr. Burt) All right, sir. You—Document No. 98 shows that you were able to sell, on July 24th, $73,000 worth. A. That's right.

Q. There was no arrangement in advance brought to your attention for the sale of those depository receipts through that First Securities Corporation? A. No, sir, I don't believe there was.

Q. Pure choice. Sir, I show you another document that has been produced down there. It is a depository receipt of Herman Hardison, First National Bank of Anson County.

Mr. Goff: Now, before this ever even gets started, Mr. Examiner, this witness cannot identify anything that Herman Hardison ever had anything to do with. This just isn't the man to prove this document up by, the wrong man. This isn't Mr. Hardison, this is Mr. Love. This document purports to have something to do with Mr. Hardison. This isn't the right man to do it with.

* * * * * *

(865) Q. Do you know, Mr. Love, who actually bought your depository receipts? A. No, sir, I don't. The security company on here sent me a check for them, that's all I know.

Q. They didn't give you any indication who bought the receipts? A. They did not.

Q. Do you know of any others in the Queen City family who have sold their depository receipts? A. My youngest son sold a small number and sold to these same people, and he knew the fellow, I think, that worked there then. And that's why I run into him.

Q. Do you know if any of the other officers or directors of the company have sold any of their depository receipts? A. I don't believe I do except what was brought out here this evening. The Hardisons, I think some of the Hardisons has sold some of theirs.

Q. Do you know to whom they sold? A. No, sir, I don't.

* * * * * *

Moore (971-73):

(971) Q. Fifty-six.

I am kind of curious about these transferable depository receipts, Mr. Moore.

Appendix G

Will you answer this question for me? Do you know, first of all, have you, or any officer, to your knowledge, of Transcontinental, Continental, or its subsidiaries, agreed, by contract or by oral agreement, to supply the funds necessary to purchase the depository receipts or to make a market in these depository receipts? A. They have not.

Q. Do you know what brokerage houses are handling the depository receipts? A. Of these companies?

Q. Yes, sir. A. No, I do not.

Q. You are not familiar with them at all? A. (Shakes head negatively.)

(972) Q. You have never heard of First Securities Corporation? A. Never heard of them before.

Q. What company do you use in the handling of your securities? A. Many companies handle our securities.

Q. In connection with the purchase of the shares which were held by Mr. Roberts in Safeway Company, Continental acquired, I gather, approximately 21 percent interest in that company through the purchase of the shares of Mr. Roberts, is that correct? A. Yes, it is.

Q. Do you recall whether it was the DuPont brokerage house that handled that transaction for you? A. Well, I don't know. Actually I didn't handle it. I wasn't here when that transaction was completed. So I don't know the details of who handled it. We did buy it, but I don't know through what firm. If you are trying to get at the Allen, John Allen connection, who is one of our directors, with DuPont, he is one of our directors and he is a partner in Francis I. DuPont and Company.

Q. Do you know—excuse me. A. I don't know what else you are trying to get at, because it is a fact. But I don't know who bought the stock.

Q. Well, Continental ended up with a 21 percent interest? A. That's right.

Q. But you don't know who handled the transaction, is that (973) right? A. No, I don't.

Q. Do you know whether Mr. Allen or the DuPont firm had any association or communication or agreement or any other connection with the securities houses that handled these transferable depository receipts? A. As far as I know, I don't know anthing about it.

Q. And a final question: What you are saying here in this hearing is that you know nothing about the market that was made in these transferable depository receipts? A. I don't know that there is a market as such.

Q. But you did seek— A. I understood from the testimony yesterday that there had been some trading. I mean, is this one, or is this ten trades, or one trade, or a hundred trades? How many, I have no knowledge of.

Q. And you are also saying whether there was one or ten, you know not how the trade or how the market was set up? A. No. Transcontinental has no commitments. I mean, we have no part of it.

* * * * * *

APPENDIX H

Initial Brief of Applicant Prior to Examiner's Report, January 25, 1965, pp. 109-110 (R. 53).

By the consummation of these transactions, the Commission will for the first time in the history of the industry enable a group of carriers under common control to achieve enough size and strength to compete, at least after a fashion, with Greyhound. To do as Interstate suggests and disallow these transactions, leaving Interstate free to pursue its own plans (for its own profit, one might add) is to allow Greyhound to divide and conquer the involved carriers and even further expand its grip on the industry. That is truly not in the public interest and must not be allowed to happen. Obviously, Greyhound would also like to see that very thing happen.

Both Interstate and Greyhound act as if these transactions are occurring in a vacuum. They both wish to treat them as unrelated to the practical facts which exist in the bus industry today. Interstate argues that the approval of these transactions results in restricting competition, and Greyhound says that they allow Transcontinental to get too big, too quickly.

Both of these positions are negative in approach. They ignore facts as they exist because of selfish interests. But the fact cannot be escaped that this Commission, consciously or unconsciously, right or wrong has over the years, created the monopoly that is Greyhound, and that today the bus industry is dominated by that monopoly. No carrier presently is big enough to contest with that monopoly on equal footing. Only Transcontinental has enough size to even try.

Appendix H

By approving these transactions, the Commission does create a duopoly within the bus industry, one side of which will be considerably the weaker. True, there is not then enough business left for the "third force," as proposed by Interstate. But again that is the *negative* approach. The *positive* fact is that in creating a duopoly, weak as one part of it is in comparison to the other, *the Commission is creating competition, not doing away with it. By putting Transcontinental in a position to compete with Greyhound, the Commission creates competition where there was none.* If it denies these applications in favor of the "third force," in effect it decrees that forever the bus industry will be a monopoly controlled by Greyhound with no force, second, third or otherwise, that can effectively compete with Greyhound.

To approve these applications is to create new competition where none existed before. To deny them is to condone a monopoly where no competition is possible. The choice should be abundantly clear.

Reply of Transcon to Interstate petition in ex parte 65 (Sub. No. 3), August 18, 1965, pp. 22-23 (R. 61).

In view of the Greyhound monopoly, the only logical and workable solution to the problem is what is being proposed by Transcontinental and the vendor carriers in the two mentioned Dockets. By the consummation of those transactions, the Commission will perhaps enable a group of carriers, under common control, to achieve enough size and strength to compete, at least after a fashion, with Greyhound. To do as Interstate suggests and

disallow those transactions, leaving Interstate free to pursue its own plans (for its own profit, one might add) is to allow Greyhound to divide and conquer and even further expand its grip on the industry. That is truly not in the public interest and must not be allowed to happen.

Interstate acts as if these transactions are occurring in a vacuum. It wishes to treat them as unrelated to the practical facts which exist in the bus industry today. Interstate argues that the approval of those transactions will result in restricting competition.

Such is not the case. This Commission, consciously or unconsciously, right or wrong, by design or otherwise, created the monopoly that is Greyhound. Only Transcontinental is anywhere close to being big enough to attempt to compete with Greyhound on equal footing.

By approving those transactions, the Commission creates a duopoly with one side of the duopoly being considerably weaker than the other. True, there is not then enough business left for a so-called "third force," as proposed by Interstate. But that is a negative approach. The positive fact is that in creating a duopoly, weak as one part of it is in comparison to the other, *the Commission is creating competition, not doing away with it.* By putting Transcontinental in a position to compete with Greyhound, the Commission creates competition where there was none. If it denies those applications in favor of a "third force," in effect it decrees that forever the bus industry will be a monopoly controlled by Greyhound with *no* force, second, third or otherwise, that can effectively compete with Greyhound.

Appendix H

To approve those applications is to create new competition where none existed before. To deny them is to condone a monopoly where no effective competitions possible.

The only effect which the proposed Guide Lines suggested by Petitioner could have, would be to affect the acquisition of carriers in the future and will have a real effect on only Transcontinental. Greyhound already has its monopoly and would of necessity continue to grow bigger, having cleared the way of effective competition for all time. Guide Lines in 1935 might have had some application to the bus industry and the shape which it was to take in the succeeding years, but to impose them at this point, without first doing something to break Greyhound up into smaller components would be to disregard present and existing facts. Its only benefit would be to Petitioners and, as an incident, to Greyhound. Everyone else, including the public, would be by far the loser.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN. 7 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 755

INTERSTATE INVESTORS, INC., *Plaintiff, Appellant,*

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

TRANSCONTINENTAL BUS SYSTEM, INC., *Intervenor-Defendant, Appellees.*

ON APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF TRANSCONTINENTAL BUS SYSTEM, INC. TO DISMISS OR AFFIRM

THOMAS F. DALY
25 Broadway
New York, N. Y. 10004
Attorney for
Intervenor-Defendant-Appellee
(212) 344-8480

Of Counsel:
JOHN W. CASTLES, 3D
WARREN A. GOFF
WENDELL DAVIS, JR.
LORD, DAY & LORD

January 6, 1969

INDEX

PAGE

Questions Presented 2

Statutes Involved 3

Statement 3

Summary of Argument 6

ARGUMENT:

POINT I. Interstate Lacks Standing to Obtain Judicial Review of the Interstate Commerce Commission's Orders 7

POINT II. The District Court Properly Affirmed the Orders of the ICC, Which Properly Rejected Interstate's "Third Force" Claim and Were Based on Substantial Evidence That the Acquisitions of Control Were in the Public Interest 17

First: The Benefit to the Public 20

Second: The Impact on Competition 22

Third: The Appraisal of the Competitive Impact and the Public Benefit of the Acquisitions 27

Fourth: Interstate's Claim That the Commission Has Created a Duopoly and Thereby Foreclosed the Creation of a "Third Force" in the Intercity Bus Industry 35

PAGE

Fifth: Interstate's Claim That Transcon's Pre-Approval Acquisitions Barred the Commission From Approving the Acquisition of Queen Under Section 5 38

POINT III. The District Court Correctly Held That the I.C.C. Orders Were Not Procured by Fraud 41

A. There Was No Evidence of a Secret Agreement to Pay Cash 42

B. There Was No Reason for Transcon to Conceal Highway's Acquisition of Queen Depositary Receipts, and No Concealment in Fact 46

C. The Decision of the Commission Was Not the Result of the Allegedly False Testimony 53

CONCLUSION 57

INDEX TO APPENDIX

Letter from Hunter Jones to W. M. Nicholson and J. B. Ledford dated January 26, 1965 ..... 1a

Letter from W. M. Nicholson to Plaintiff-Appellant dated January 28, 1965 ..... 3a

January 29, 1965 Resolution of Board of Directors of Plaintiff-Appellant 5a

PAGE

Letter from Hunter Jones to Nicholson and Ledford dated February 1, 1965 ..... 7a

Letter from J. B. Ledford to Plaintiff-Appellant dated February 2, 1965 ..... 9a

Letter from Plaintiff-Appellant to I.C.C. (Acting Secretary) dated February 2, 1965 ..... 11a

Letter from William R. Burt to The Hon. J. Braxton Craven, Jr. dated February 4, 1965 ..... 15a

Letter from William R. Burt to James Ledford dated February 8, 1965 ..... 18a

Request of Plaintiff-Appellant To Be Dismissed as Protestant in Dockets MC-F-8744 and 8774 and Finance Dockets 23123 and 23159 dated February 16, 1965 ..... 21a

Transcript of Proceedings—February 18, 1965, United States District Court for the Western District of North Carolina 24a

General Releases to Queen City Coach Corp., et al. and to Transcontinental Bus System, Inc. dated February 18, 1965 ..... 29a

Request of Plaintiff-Appellant for Leave to Withdraw in Ex Parte MC-65 [Sub. No. 3] dated February 18, 1965 ..... 34a

Judgment Dismissing Civil Actions Nos. 1914, 1935 U.S.D.C., WD N. Car., dated February 19, 1965 .... 36a

PAGE

Letter from Plaintiff to I.C.C. (Acting Secretary) dated February 26, 1965 ..... 40a

Letter from Hunter Jones to I.C.C. (Acting Secretary) dated March 4, 1965 ..... 42a

Letter from Plaintiff-Appellant to I.C.C. (Acting Secretary) dated March 10, 1965 ..... 44a

Letter from W. M. Nicholson and James B. Ledford to Hunter Jones dated March 11, 1965 ..... 45a

Letter from Warren A. Goff to I.C.C. dated June 25, 1965 and Enclosed Tax Ruling 49a

Affidavit of Douglas D. Drysdale Sworn to on May 24, 1967 ..... 58a

Article Appearing in Wall Street Journal—3 August 1964, p. 13 ..... 67a

Letter, Interstate's Secretary to Hunter Jones, 4/9/65 .. 69a

CITATIONS

Cases:

A. C. Allyn and Co., et al.-Control; Transcontinental Bus System, Inc.-Control-Continental Bus System, Inc., et al., 50 M.C.C. 193 (1948) 29

American Trucking Assns. v. *United States*, 364 U.S. 1 (1960) 16

Arkansas Motor Coaches, Ltd., Inc., 70 M.C.C. 809 (1956) 30

Assigned Car Cases, 274 U.S. 564 (1927) 34

PAGE

Atchison, Topeka & Santa Fe Ry. v. *United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd* 350 U.S. 892 (1955) 15, 16
Atlantic Greyhound Corporation, 80 M.C.C. 802 (1959) 32

Bayshore Buslines, Inc., 65 M.C.C. 805 (1955) 30
Bowen Motor Coaches-Extension-Tucumcari, Docket No. MC-9259 (Sub. No. 21) (not printed) 28
Brownlee v. *Malco Theaters*, 99 F. Supp. 312 (W.D. Ark. 1951) 16
Bryan v. *Kennett*, 113 U.S. 179 (1885) 14

Canadian Greyhound Lines, Ltd., and Toronto Greyhound Lines, Ltd., 35 M.C.C. 599 (1940) 31
Canadian Pacific Ry. Co. v. *United States*, 158 F. Supp. 248 (D. Minn. 1958) 37
Capital Greyhound Lines, 60 M.C.C. 804 (1954) 32
Capital Greyhound Lines, 65 M.C.C. 809 (1955) 32
Capitol Bus Company, Extension-Elmira-Wilkes-Barre, 83 M.C.C. 559 30
Capitol Bus Company Extension-Washington, D.C., 69 M.C.C. 447 30
Carolina Coach Company-Control and Merger-Norfolk Southern Bus Corp., 59 M.C.C. 681 31
Central Bus Lines, Inc., 59 M.C.C. 805 (1953) 29
Central Greyhound Lines, Great Lakes Greyhound Lines, Illinois Greyhound Lines, Ohio Greyhound Lines, 55 M.C.C. 237 (1948) 32
Central Greyhound Lines, Inc., Northland Greyhound Lines, 25 M.C.C. 59 (1939) 31
Central Greyhound Lines of New York, 65 M.C.C. 810 (1955) 32
Crescent Stages, Inc., 59 M.C.C. 491 (1953) 29

PAGE

Denver-Colorado Springs-Pueblo Motorway, Inc., 55 M.C.C. 31, 58 M.C.C. 801 (1952) 29
Denver and Rio Grande Western R. Co. v. *United States*, 387 U.S. 485 (1967) 40
Dixie Greyhound Lines, Florida Greyhound Lines, Northwest Greyhound Lines, and North Coast Greyhound Lines, 56 M.C.C. 238 (1949) 32
Dowell v. *Applegate*, 152 U.S. 327 (1894) 14

Eastern Canadian Greyhound Lines, Ltd., 70 M.C.C. 806 (1957) 32
Eberhart Steel Products Co. v. *United States*, 60 Ct. Cl. 912, *cert. denied*, 269 U.S. 571 (1925) 15
Edward Hines Trustees v. *United States*, 263 U.S. 143 (1923) 15

Federation of Union Representatives v. *N.L.R.B.*, 339 F. 2d 126 (2d Cir. 1964) 54
William N. Feinstein & Co. v. *United States*, 209 F. Supp. 613 (S.D.N.Y. 1962), *aff'd* 317 F. 2d 509 (2d Cir. 1963) 35, 54
Florida Greyhound Lines, 40 M.C.C. 802 (1945) 32

The Greyhound Corporation-Control-Pacific Greyhound Lines-Control and Merger-Geronimo Lines, Inc., 56 M.C.C. 415 31
The Greyhound Lines, Inc., 93 M.C.C. 392 (1963) 32
Greyhound Lines, Inc.-Extension-Lincoln, Neb., 99 M.C.C. 299 31
Greyhound Mergers, Docket No. MC-F-9136 (1968) 33
Grymes v. *Sanders*, 93 U.S. 55 (1876) 15

PAGE

Higginson v. *Schoenenman*, 190 F. 2d 32 (D.C. Cir. 1951) 14
Hudson v. *Lewis*, 188 F. 2d 679 (5th Cir. 1951) 14

I and S Trailways, Inc., Extension-Knoxville, Tenn.; 49 M.C.C. 872 28
Illinois Greyhound Lines, Inc.-Purchase-Southern, Ltd., 38 M.C.C. 641 31
In re Cuddy, 131 U.S. 280 (1889) 14

Joel W. Wright et al.-Control-Queen City Coach Co. and Smokey Mountain Stages, Inc.-Control-Georgia, Florida Coaches, Inc., 50 M.C.C. 325 28-29

Kempe's Lessee v. *Kennedy*, 9 U.S. (5 Cranch) 173 (1809) 14

L. L. Brown Paper Co. v. *Hydroiloid*, 118 F. 2d 674 (2d Cir. 1941), *cert. denied*, 314 U.S. 653 (1941) 14-15

Martin v. *Phillips Petroleum Co.*, 365 F. 2d 629 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1967) 16
McCormick v. *Sullivant*, 23 U.S. (10 Wheat.) 192 (1825) 14
McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944) 17, 18, 19, 20, 22
Midwest Buslines, Inc. (1960) (not printed) 30
Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173 (1959) 19, 37
Missouri Pacific Transportation Co., Extension of Operations, 22 M.C.C. 321 28
Moffat Tunnel League v. *United States*, 289 U.S. 113 (1933) 15

PAGE

Mt. Hood Stages-Extension-Salt Lake City, 44 M.C.C. 535 28

N.L.R.B. v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir. 1961) 54

New England Greyhound Lines, Inc., 60 M.C.C. 804 (1954) 32

Northeastern Missouri Greyhound Lines, 50 M.C.C. 441 (1948) 32

Northeastern Missouri Greyhound Lines, 75 M.C.C. 339 (1958) 32

Northland Greyhound Lines, 65 M.C.C. 816 (1956) 32

Pacific Greyhound Lines, 70 M.C.C. 59 (1956) 32

Pennsylvania Greyhound Lines, Pennsylvania Greyhound Lines of Virginia and Pennsylvania Greyhound Lines of Indiana, 60 M.C.C. 803 (1954) 32

Pittsburgh & W. Va. Ry. v. *United States*, 281 U.S. 479 (1930) 15, 16

Rio Grande Motor Way, Inc., 55 M.C.C. 31, 58 M.C.C. 801 (1952) 29

Rio Grande Motor Way, Inc., 59 M.C.C. 233 (1952) 29

Safeway Trails, Inc.-Control and Merger-Quaker City Bus Co., 70 M.C.C. 377 31

Safeway Trails, Inc. and Virginia Stage Lines-Control-Trailways of New England, Inc., 75 M.C.C. 179 31

Seaboard Air Line R. Co. v. *United States*, 382 U.S. 154 (1965) 19

Seatrain Lines v. *United States*, 152 F. Supp. 619 (D. Del. 1957), *aff'd per curiam*, 355 U.S. 181 (1957) 15

PAGE

Singer & Sons v. *Union Pacific R. Co.*, 311 U.S. 295 (1940) 16
Smoky Mountain Stages, 70 M.C.C. 77 (1956) 30
Southeastern Greyhound Lines-Control-Lewisburg Bus Lines, Inc., Georgia Stages, Inc., Crescent Stages, Inc., 40 M.C.C. 375, 45 M.C.C. 185 31
Southeastern Greyhound Lines, 57 M.C.C. 123 (1950) 32
Southeastern Greyhound Lines of Indiana, 57 M.C.C. 808 (1951) 32
Southern Bus Lines, Inc., 56 M.C.C. 803 (1949) 29
Southern Kansas Greyhound Lines, 45 M.C.C. 679 (1947) 32
Southwestern Greyhound Lines, 75 M.C.C. 339 (1958) 32
Southwestern Greyhound Lines, Inc.-Extension-Lower Rio Grand Valley, Docket No. MC-1510 (Sub. No. 59), noted at 78 M.C.C. 805 31
Southwestern Greyhound Lines, Inc.-Merger-Arkansas Motor Coaches, 39 M.C.C. 721 31
Sprunt & Son v. *United States*, 281 U.S. 249 (1930) 15

Taho Greyhound Lines, 37 M.C.C. 654 (1941) 31-32
Tamiami Trail Tours, Inc.-Extension-Jacksonville-Canal Point, Fla., 84 M.C.C. 703 30
Teche Greyhound Lines, 36 M.C.C. 397 (1941) 31
Tennessee Trailways, Inc., 87 M.C.C. 775 (1961) 30
Transcontinental Bus System, Inc.-Control-American Buslines, Inc., 59 M.C.C. 233 29

Union Bus Lines, Inc., and Randolph Field Bus Company, Inc., 65 M.C.C. 803 (1956) 30

Valley Transit Lines, 58 M.C.C. 805 (1952) 29

PAGE

Vance v. *Chicago Portrait Co.*, 19 F. 2d 981 (7th Cir. 1927), *cert. denied*, 275 U.S. 567 15

Warehouse Co. v. *United States*, 283 U.S. 501 (1931) 54

West Coast Bus Lines, Extension of Operations-Stockton, 48 M.C.C. 177 28

West Coast Bus Lines Common Carrier Application, 32 M.C.C. 692 28

West Coast Bus Lines, Ltd., 50 M.C.C. 525 (1948) 29

Rule:

Rule 16 of the Rules of the Supreme Court of the United States 1

Statutes:

15 U.S.C. § 15 16

28 U.S.C. §§ 2284 and 2325 3

49 U.S.C. § 5 3

Clayton Act:

Section 7 ..... 17, 38, 39, 40, 41

Interstate Commerce Act:

Section 5 ..... 3, 6, 14, 17, 18, 19, 34, 38, 40

Section 5(2) 4, 20, 37

Section 5(4) 41, 46, 52

Section 20 40

PAGE

Internal Revenue Code of 1954:

Section 354 45

Section 361 45

Section 368(a)(1)(A) 45

Section 368(a)(2)(C) 45

Motor Carrier Act of 1935 ..... 27, 34

North Carolina Business Corporation Act:

Section 55-108 45

Other Authorities:

Note, *Competitors' Standing to Challenge Administrative Action under the A.P.A.*, 104 U.Pa. L. Rev. 843 (1956) 16

Restatement, Judgments, § 11(b) 14

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

INTERSTATE INVESTORS, INC., *Plaintiff,*
Appellant,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

TRANSCONTINENTAL BUS SYSTEM, INC., *Intervenor-Defendant,*
Appellees.

ON APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF TRANSCONTINENTAL BUS SYSTEM, INC. TO DISMISS OR AFFIRM

Intervenor-defendant-appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal of Interstate Investors, Inc. from the order of the District Court affirming Interstate Commerce Commission orders dated August 10, 1966 on the ground that plaintiff-appellant lacks the requisite standing to prosecute this appeal, or alternatively, to affirm the said orders of the District Court on the ground that it is manifest that

the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Questions Presented

1. Does appellant, an investment company, have the requisite standing to seek review in this Court of Interstate Commerce Commission orders granting applications of intervenor-defendant-appellee, a major bus company, for control of three regional bus companies, where appellant:

(a) claims no interest whatever with respect to two* of the three regional bus companies over which control is sought,

(b) sold and released for $25,425 any and all interest or expectancy of any kind whatsoever which it may have had in the third bus company** and retained and has never returned or offered to return the said $25,425; and

(c) is not and never has been an owner or operator of any bus company or other carrier.

2. Was the three-judge District Court correct in its unanimous holding that the orders of the Interstate Commerce Commission granting intervenor-defendant-appellee's applications for control were based upon substantial evidence and were not tainted by any fraud?

---

* Virginia Stage Lines Inc. (Virginia); Safeway Trails Inc. (Safeway).

** Queen City Coach Co. (Queen).

Statutes Involved

The statutes involved are set forth at pages A134 to A146 of the appendix to appellant's Jurisdictional Statement.

Statement

This is a direct appeal from an order entered on July 22, 1968 by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325 dismissing appellant's complaint, which sought to set aside various orders of the Interstate Commerce Commission.

On May 7, 1964 Transcontinental Bus System, Inc. (Transcon) applied under Interstate Commerce Act § 5, 49 U.S.C. § 5, to acquire control of Virginia and Safeway (A41).* On March 26, 1964 Transcon had contracted to acquire the controlling stock of Virginia, and on April 22, 1964 had made a similar contract for the acquisition of Safeway stock (A47-A48).

Subsequent to the making of these contracts and applications for control, and as an independent matter, Transcon contracted on May 21, 1964 (as of May 16, 1964) for the acquisition of the shares of Queen (R. 53-Exh. 14). On June 5, 1964 Transcon applied to the I.C.C. for authority to control Queen.

All three contracts provided that the shares to be purchased would be deposited with a depositary bank which would issue transferable receipts therefor. Each contract

---

* Pages of appellant's Jurisdictional Statement are indicated by "JS", the appendix to the Jurisdictional Statement by "A", the Record on Appeal by "R", and the appendix to this motion by "a".

provided that the purchase agreement was to be consummated only after the I.C.C. and all other applicable regulatory bodies had approved the proposed exchange of stock, and each contained a condition precedent to the consummation of the agreement that the selling stockholders shall have received from the Internal Revenue Service a ruling that the exchanges of stock contemplated by the contract would not give rise to recognition of any gain or loss for federal income tax purposes.

On July 20, 1964 the I.C.C. consolidated both of Transcon's applications under the Interstate Commerce Act § 5(2) for acquisition of control, and two additional applications under the Interstate Commerce Act § 20(a) for authority to issue the necessary stock with which to acquire Virginia, Safeway and Queen.

Hearings on this consolidated record were held on September 9, 10, 11, 14 and 15 and on October 26, 27, 28 and 29, 1964. Interstate appeared in opposition to Transcon's application to acquire Queen (R. 53-Tr. 8, 9, 90), and from the conclusion of the hearings on October 29 until the issuance of the final order of the I.C.C. on August 10, 1966 it filed two briefs, one set of exceptions, 15 motions and six petitions in opposition to Transcon's applications.

Between June 15, 1964 and August 23, 1965 Highway Insurance Company (Highway), a subsidiary of Transcon, purchased a total of 2004 depositary receipts representing approximately 9% of the outstanding shares of Queen (A167).

In November 1964 Transcon furnished the Bureau of Enforcement of the I.C.C. with all records relating to the purchase by Highway of the 1387 depositary receipts it had purchased by that time (R. 53-Reply of Transcon,

11/5/65, p. 5; R. 53-Reply of Transcon, 12/27/65, p. 12; R. 53-Reply of Transcon, 2/14/66, p. 35; Answer of Transcon, 8/9/65; Reply of Transcon, 1/24/66). In June 1965, four months before the filing of the hearing examiner's report, Transcon filed Exhibit No. 168 (49a-57a R. 53-Exh. 168) showing that Highway had acquired depositary receipts representing 1,387 shares of Queen and 829 shares of General Realty, a corporation affiliated with Queen. Thus, the hearing examiner was aware before he filed his report that Transcon had acquired certain rights to Queen stock (A126).

On October 19, 1965 the hearing examiner filed his 33-page report approving Transcon's applications for acquisition of control of Virginia, Safeway and Queen (A77-A133). On August 10, 1966 the Commission authorized Transcon to acquire the three bus companies and (a) found that the acquisitions would substantially increase the operating efficiencies of the company, would permit substantial cost savings and would facilitate the implementation of through service (A65-A66); (b) found that the acquisitions would result in an elimination of a minimal amount of competition and would greatly strengthen the competition in the eastern part of the U. S. against Greyhound Lines Inc. (Greyhound) (A64); (c) concluded that the proposed acquisitions would be in accord with the Commission's long standing policy of fostering combinations where the result would be to improve the national transportation system and strengthen competition to Greyhound (A64-A66), and also (d) concluded that the purchase by Transcon, during the pendency of its application to the I.C.C., of certain deposit receipts for Queen stock would not bar approval of the proposed acquisition (A60).

Summary of Argument

1. Interstate is without standing in this Court to challenge the judgment of the District Court or the orders of the Commission because it has no interest of any kind whatsoever in Virginia or Safeway and sold for $25,425 on February 18, 1965 whatever interest it may ever have had in Queen.

2. The proper measure of the legality of Transcon's acquisition of the three carriers is not the antitrust laws, but Section 5 of the Interstate Commerce Act. The Commission under Section 5 properly considered the question of the anticompetitive impact, if any, of the acquisitions and concluded, on the basis of substantial evidence, that the acquisitions would be in the public interest as a result of benefits accruing from improvements in transportation and the resulting increase in competition.

3. The Commission's decision was not tainted by fraud. There was no fraud on Transcon's part. Interstate in charging fraud has misrepresented the facts in a number of material respects, including the unconscionable distortion of the testimony of Transcon's witness Scheitel by completely altering the context of his allegedly false answer to make it appear that the answer was a denial of knowledge of the purchase of *depositary receipts* instead of a denial of knowledge of the purchase of *Queen stock* (see pp. 49-51 *infra*).

ARGUMENT

POINT I

Interstate Lacks Standing to Obtain Judicial Review of the Interstate Commerce Commission's Orders.

The District Court expressed the view that "plaintiff has no interest at all in the acquisition of Virginia and Safeway" (A37). As to Queen, an intercity carrier with net assets in 1964 of $6,619,168, the court concluded that Interstate had contracted away its rights, and that the proper way to raise the question of the validity of its contract releasing its rights would be in a proceeding in the Western District of North Carolina (A38).

Interstate is not an intercity carrier of passengers or freight. It has never owned a single bus, and it has never carried a single passenger. It is not a competitor, a shipper, or a customer of Safeway, Virginia or Queen. Interstate's sole and only contact with the intercity bus industry and the sole basis upon which it predicates its standing to challenge the ICC orders in this case is this: Interstate claims once to have had an oral contract to purchase the controlling shares of Queen. (JS 77, 79) It is this which Interstate denominates a "tangible contractual expectancy" (JS 79).

Whatever contractual expectancy Interstate may have had when the ICC hearings commenced in September 1964 terminated on February 18, 1965. Shortly following the announcement of Transcon's contract to acquire Queen, Interstate brought an action in the Western District of North Carolina to recover $2,300,000 damages for an al-

leged breach of Interstate's alleged oral contract to purchase Queen. Named as defendants were Queen, an affiliate (GRIC) and the Queen shareholders who had allegedly orally contracted to sell their Queen stock to Interstate. In September 1964, after institution of the North Carolina lawsuit, Interstate appeared before the I.C.C. to oppose Transcon's applications, but did not file an application to acquire control of Queen. On February 18, 1965, Interstate, through its President and principal stockholder, Mr. Burt, accepted $25,425 in cash in full discharge of any and all liability of the Queen shareholders to Interstate. In exchange for the $25,425, Interstate executed eight general releases, including one to Transcon, and a petition to withdraw all opposition to the I.C.C. proceedings, and consented to the entry of judgment of dismissal with prejudice of its contract action.* Interstate has never returned

---

* The release to Queen (29a R. 55-14, pp. 3, 4) states that Interstate and Mr. Burt, as part of the settlement and in consideration of $25,425 paid to Interstate, release and discharge Queen from all claims and causes of action, including but not limited to claims and causes of action on contract or for breach of contract, in tort, claims and causes of action arising under the antitrust laws and any other Federal or State statute or law which Mr. Burt or Interstate then had or would thereafter have growing out of occurrences from the beginning of the world until the day of the release. The releases further stated, "Interstate Investors, Inc. and William R. Burt agree that neither of them will, in the future, directly or indirectly do anything to hinder or delay favorable action by the Interstate Commerce Commission, or any member, agent or agency of said Commission, upon the pending application for approval of said exchange of stock of Queen City Coach Company for stock of Transcontinental Bus System, Inc.; and the undersigned recognize that this agreement precludes them from making any request or suggestion that any other person, corporation, governmental agency or governmental employee do anything to oppose, hinder or delay such approval." (R. 55-14, p. 2) In addition to the releases Mr. Burt, on behalf of Interstate, executed a request for leave to withdraw from the proceedings before the ICC. (R. 55-15) Further, Interstate agreed to the entry of a judgment dismissing with prejudice its action in the Western District of North Carolina. (R. 55-16)

or tendered the $25,425 it received. It has never appealed the judgment against it. It has never brought a proceeding to rescind the releases it executed.

The effect of this settlement, comprising the releases, the undertaking to withdraw opposition to the ICC proceeding and the judgment of dismissal with prejudice, was, among other things, to discharge all claims of Interstate against the Queen stockholders and Queen. The three judge District Court described the effect of this settlement as follows:

> "* * * while Interstate might have had standing under its contract to purchase Queen, it now appears that it contracted that right away. The releases required by the settlement, if valid, completely discharge any liability the Queen shareholders might have had to sell their stock to Interstate." (A38)

There can be no question that Interstate knowingly and voluntarily entered into the February 18, 1965 settlement. Interstate decided to settle because it was concerned that the District Court was about to enter summary judgment against it, and because it regarded the offer of $25,425 as a "substantial monetary settlement." (11a R. 55-9, letter, 2/2/65, Burt to Mrs. Armes, Acting Secretary, ICC, pp. 2, 3; 15a R. 55-10, letter, 2/4/65, Burt to District Judge Craven, pp. 1, 2). Immediately following the execution of the settlement papers, Mr. Burt, who is a member of the New York and D. C. Bars went before District Judge Craven and the following took place:

> "Mr. Nicholson [attorney for Interstate]: Your Honor, I am pleased to state to the Court that a voluntary settlement satisfactory to our client has been entered into and the papers have been signed.

"Court: I am pleased, too. In view, however, of Mr. Burt's letter to me I want to inquire of him if this is one that is indeed satisfactory and I don't want him to settle this case if he feels in the slightest coerced by this Court because such a settlement is a terrible thing.

"Mr. Nicholson: He has expressed to me his satisfaction of the settlement.

"Mr. Burt: Yes, sir, I'm pleased with the settlement that has been worked out." (24a R. 55-13, p. 2).

The court's question was prompted by Mr. Burt's *ex parte* letter to District Judge Craven on February 4, 1965 in which Mr. Burt raised the question of whether Interstate had "had a fair day in court on the basis of which the settlement was evolved." Mr. Burt charged the District Judge with having threatened the entry of summary judgment for the defendants if the matter were not promptly settled. In Mr. Burt's own words to District Judge Craven:

"* * * you were mousetrapped into expressing your views on the merits prior to fair opportunity having been accorded plaintiff to permit it to develop an adequate factual record * * *

"Counsel for defendants had indicated that you were instrumental in defendants setting the limits of their settlement offer and you, of course, know the pressure that has been exerted on Mr. Nicholson [Interstate's attorney] by the possibility that the boom would be lowered within a matter of hours on plaintiff [Interstate] in the form of entry of the granting of the motions for summary judgment by defendants unless settlement was reached." (16a R. 55-10, p. 2)

Interstate fully recognizes that the settlement, if honored, discharges Queen and its stockholders from all liability arising out of Interstate's alleged oral contract and thus effectively terminates any interest it may have had in Queen. It now seeks to evade the binding effect of what happened on February 18, 1965 by representing to this Court that Transcon delayed disclosing the purchase of depositary receipts until after the settlement and that Interstate was induced to settle by its reliance on the allegedly false testimony of Moore, Scheitel and Love. (JS 32-33, 82) In short, Interstate predicates its attempt to repudiate the settlement, including the releases, on the discovery in June of 1965 that Transcon purchased depositary receipts representing Queen stock. These assertions by Interstate are false. (1) Transcon did not delay disclosure of the purchase of the depositary receipts until after the settlement; disclosure was made two weeks before the settlement. (2) Interstate was not induced to settle by the testimony of Moore, Scheitel and Love; Interstate settled because it believed the District Court was about to enter summary judgment dismissing its complaint and because it regarded the $25,425 as a "substantial" amount. Mr. Burt did not first attempt to repudiate the release and settlement when he says he first learned of the falsity of the Moore, Scheitel and Love testimony; he had attempted to repudiate the settlement shortly after it was made, long before June 1965, on grounds wholly unrelated to the Moore, Scheitel and Love testimony. We deal separately with each of these false assertions of Interstate.

First: The Charge That Transcon Delayed Disclosure of the Purchase of the Deposit Receipts to the I.R.S. Until After Settlement of the North Carolina Suit. (JS pp. 32-

33, n. p. 33). The suit was settled on February 18, 1965. Queen's attorney with Transcon's consent wrote the I.R.S. setting forth the facts concerning the purchase of the depositary receipts on *February 4, 1965*. (R. 41-43). Disclosure of the purchase was, therefore, made two weeks *before* Interstate received its $25,425 and agreed to settle. Thus, Interstate's charge on page 33 (footnote) of the Jurisdictional Statement that " * * * disclosure was not made until Transcon believed that the Queen stockholders had purchased appellant's silence" is totally false.

Second: The Assertion That Interstate Was Induced to Settle by the Testimony of Moore, Scheitel and Love and That the Repudiation of the Release Was Based on the Discovery of the Alleged Falsity of That Testimony. The basic fact is that Interstate made the settlement because it was concerned about the imminent loss of defendant's summary judgment motion and because it then regarded the $25,425 as a "substantial" not a "nominal" amount, as it now claims.* These facts clearly appear from pages 2-3 of the letter Mr. Burt wrote to the Acting Secretary of the I.C.C. on February 2, 1965 (11a R. 55-9) and from pages 1-2 of the letter Mr. Burt wrote to District Judge Craven on February 4, 1965 (15a R. 55-10). These contemporaneous documents penned by Mr. Burt on the eve of the settlement unequivocally belie Interstate's current representation that the settlement was induced by the testimony of Messrs. Moore, Scheitel and Love.

Interstate would have it appear that after having been duped into the settlement on February 18, 1965, it did not challenge the settlement until it learned for the very first

* See footnote at JS 33.

time of the purchase of the depositary receipts by Transcon in the I.R.S. ruling of June 28, 1965. The settlement was hardly made before it was challenged by Mr. Burt on February 26, but clearly not, as Mr. Burt now claims, because of the alleged disclosures in the late filed Exhibit 168 (49a R. 53-Exh. 168), which did not come into existence until three months later. The fact is that Mr. Burt sought to repudiate the settlement long before he says he first learned of the purchase of the depositary receipts. Within weeks after receiving the $25,425 on February 18, 1965, Mr. Burt sought to repudiate the settlement that he had entered into on the incredible ground that he, as President and chief executive officer and principal stockholder of Interstate, had not been duly authorized by the Board to execute the settlement (69a R. 55-21, letter Interstate's secretary to Hunter Jones 4/9/65). This drew from his own attorney a letter to the other parties to the litigation asserting unequivocally that Mr. Burt had been duly authorized to settle the action and that the action had been duly and properly in all respects settled (45a R. 55-20, letter from Nicholson and Ledford to Jones, 3/11/65). All this took place in March and April of 1965, months before the time when Mr. Burt now tells us he first learned of the falsity of the Moore, Scheitel and Love testimony, that is after June ~~15,~~ 1965, when the time the I.R.S. issued its ruling (49a R. 53-Exh. 168).

Interstate's efforts to evade the consequence of its actions on February 18, 1965 do not stop with factual misrepresentations. At page 82 of the Jurisdictional Statement, Interstate asserts:

> " • • • The release in no way ran to, or released, the Interstate Commerce Commission or the United States which are the only parties defendant here. Transcon's

voluntary intervention waived whatever benefit they may claim from the release."

The point is not that the release did not run to the Commission or the United States; the point is that the settlement, including the releases, the agreement to terminate opposition to the Section 5 application, and the judgment with prejudice, operated to discharge the Queen stockholders and Queen of all possible liability to Interstate and thus to extinguish whatever interest Interstate may ever have had in Queen. The claim that Transcon's voluntary intervention in the District Court proceedings "waived" its right to challenge Interstate's standing is absurd. One of the principal grounds for Transcon's intervention was to challenge Interstate's standing, that is, to enforce against interstate the settlement which Interstate had voluntarily made on February 18, 1965.

The District Court was clearly correct in holding that Interstate's relief, if any, must be sought in the District Court for the Western District of North Carolina (A38), for the judgment dismissing with prejudice Interstate's contract claim is not subject to a collateral attack. *Restatement, Judgments,* § 11(b); *Bryan* v. *Kennett,* 113 U.S. 179 (1885); *Higginson* v. *Schoeneman,* 190 F. 2d 32 (D.C. Cir. 1951); *Hudson* v. *Lewis,* 188 F. 2d 679 (5th Cir. 1951); *Dowell* v. *Applegate,* 152 U.S. 327 (1894); *In re Cuddy,* 131 U.S. 280 (1889); *McCormick* v. *Sullivant,* 23 U.S. (10 Wheat.) 192 (1825); *Kempe's Lessee* v. *Kennedy,* 9 U.S. (5 Cranch) 173 (1809). Moreover, acceptance and retention of benefits of a settlement agreement with knowledge of facts rendering it voidable ratifies the contract and waives all rights to impeach it. *L. L. Brown Paper Co.* v. *Hydroiloid,* 118 F. 2d 674 (2nd Cir. 1941), *cert. denied,*

314 U.S. 653 (1941); *Eberhart Steel Products Co.* v. *United States,* 60 Ct. Cl. 912, *cert. denied,* 269 U.S. 571 (1925). If a party wishes to set aside or avoid a compromise agreement, he must, absent excuse, place the other party in *status quo* by returning or tendering back the consideration received. *Grymes* v. *Sanders,* 93 U.S. 55 (1876); *Vance* v. *Chicago Portrait Co.,* 19 F. 2d 981 (7th Cir. 1927), *cert. denied,* 275 U.S. 567. This Interstate has never done. The cases cited by Interstate at page 82 of its Jurisdictional Statement hold no more than that a release contract may be impeached only in a proceeding in which all parties to the release are present, which is not here the case.

Even if Interstate had not sold its interest for $25,425 cash, it would have no standing in the federal courts to challenge these administrative rulings. Standing before the I.C.C. is not the same as, nor does it confer, standing in a federal court to challenge a Commission order. *Sprunt & Son* v. *United States,* 281 U.S. 249 (1930); *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479 (1930); *Atchison, Topeka & Santa Fe* v. *United States,* 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd.* 350 U.S. 892 (1955). See *Seatrain Lines, Inc.* v. *United States,* 152 F. Supp. 619 (D. Del.), *aff'd. per curiam,* 355 U.S. 181 (1957).

Standing to challenge administrative orders turns on whether the Commission order provides or produces legal injury *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479 (1930); *Moffat Tunnel League* v. *United States,* 289 U.S. 113 (1933); *Edward Hines Trustees* v. *United States,* 263 U.S. 143 (1923) (A36). Accordingly, standing to challenge administrative orders in a regulated industry is granted to competing carriers or shippers affected by the order to protect their own economic self-interest. Such

standing does not exist where there is no existing interest to protect but merely an intent to enter the regulated industry. Note, *Competitors' Standing to Challenge Administrative Action under the A.P.A.*, 104 U.Pa. L. Rev. 843, 848-849, 853 (1956). *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479, 487, n. 7 (1930). See *Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295 (1940). Interstate does not fit this standard for it had no existence in 1964 as a competitor, shipper, or passenger of any bus company. Indeed, it never at any time owned a single bus or carried a single passenger. Further, even if Interstate were an existing carrier, the transaction it seeks to block is not one which creates new operating rights which might damage existing carriers. *Atchison, Topeka & Santa Fe Railway* v. *United States*, 130 F. Supp. 76 (E.D. Mo.), *aff'd.* 350 U.S. 892 (1955); *American Trucking Assns.* v. *United States*, 364 U.S. 1 (1960). Finally, the fact that Interstate wanted to buy into the industry and claims it was prevented from so doing by an alleged breach of the antitrust laws does not afford Interstate standing in a judicial proceeding to challenge these I.C.C. orders. It is settled that one who wishes to buy a business and alleges he was prevented from doing so has no cause of action under the antitrust laws, because he is not injured in his business. 15 U.S.C. § 15. *Martin* v. *Phillips Petroleum Co.*, 365 F. 2d 629 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1967); *Brownlee* v. *Malco Theaters*, 99 F. Supp. 312 (W.D. Ark. 1951).

Accordingly as Interstate has never had, and has never claimed to have had, any contact of any kind whatsoever with Virginia or Safeway, and as its sole contact with Queen—the alleged contractual expectancy—was terminated on February 18, 1965, it has no interest of any kind

which, under the foregoing cases, would afford it standing to challenge the judgment of the District Court. We, therefore, respectfully submit that the instant motion to dismiss the appeal for lack of standing should be granted.

POINT II

The District Court Properly Affirmed the Orders of the ICC, Which Properly Rejected Interstate's "Third Force" Claim and Were Based on Substantial Evidence That the Acquisitions of Control Were in the Public Interest.

Interstate would measure the legality of Transcon's acquisitions solely by the standard of the antitrust laws (JS 39-44, 57-64). Interstate's argument is that (a) under section 7 of the Clayton Act a duopoly is illegal (JS 40-44); (b) no antitrust immunity under Section 5 of the Interstate Commerce Act should be granted by the Commission because (i) the *McLean** doctrine should be overruled, or (ii) if *McLean* is followed, the Commission erred in concluding that the benefits to the public from the acquisitions overrode the alleged anti-competitive consequences of the resulting duopoly (JS 44-54); and (c) the Commission erred in failing to consider the desirability of a "third force" in the industry (JS 54-57). The argument is also made that the acquisition by Transcon of stock of Safeway and Virginia and of certain depositary receipts representing Queen stock prior to Commission approval violated Section 7 of the Clayton Act and therefore foreclosed Commission approval under Section 5 of the Interstate Commerce Act (JS 57-64).

---

* *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944).

Interstate is making the very argument which this Court rejected in *McLean*: that the acquisition or consolidations, "• • • notwithstanding the Commission's approval, violates the [antitrust laws]; hence the Commission is without power to approve the merger" 321 U. S. at 77. But emphasis on the antitrust laws simply disregards the fact that the legality of combinations of common carriers is to be determined under section 5 of the Interstate Commerce Act and not the antitrust laws. (*id.* at pp. 77-79.) Under Section 5 the primary consideration is to ensure "adequate transportation service" (*id.* at p. 81), and "preservation of competition among carriers is significant chiefly as it aids in the attainment of the objectives of the national transportation policy" (*id.* at pp. 85, 86), that is, attainment of an "improved transportation service." (*id.*, at pp. 72, 88). It follows that in determining whether to approve a merger or acquisition under section 5, the Commission is not to consider whether the acquisition does or does not violate the antitrust laws (*id.*, p. 86). The Commission in acting under section 5 must ascertain the anti-competitive consequences of the proposed merger or acquisition and then decide whether the benefits to the public from the combination of carriers outweighs or overrides whatever anti-competitive consequences there may be (*id.*, at p. 87). And most certainly those anti-competitive consequences are not to be appraised by the standard of the antitrust laws. (*id.*, at p. 86).

This Court has repeatedly held that it is the wisdom of the Commission, not the courts, which must determine whether an acquisition is consistent with the public interest (*id.*, at pp. 87-88). And this Court has recognized that Congress left to the Commission the task of resolving the

conflict between antitrust considerations and public interest considerations arising from combinations of carriers in the motor carrier industry. (*id.*) The court's function is merely to determine whether there is substantial evidence to support the ultimate findings of the Commission. (*id.*, at pp. 88-90). Interstate asks that this Court overrule these long established, carefully considered principles* harmonizing the policies underlying section 5 and those underlying the antitrust laws in cases involving combinations of common carriers without, however, suggesting any reason or authority for so drastic a step.

The questions here are: was there substantial evidence to support the Commission's finding that (i) the proposed combinations would further the national transportation policy by benefiting the public through improved transportation facilities, (ii) the anti-competitive consequences of the proposed combination would be minimal and would be greatly outweighed by the strengthening of competition that would result from the consolidation, (iii) benefits to the public would override and outweigh whatever detriments there may be from any possible anti-competitive consequences the consolidation might have, and (iv) Interstate's contentions were without merit?

There can be no question that the Commission has carefully and properly performed its task under Section 5, as defined in *McLean, Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959); and *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965).

---

* The *McLean* doctrine has recently been reviewed and reaffirmed in *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965) and in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959).

First: The Benefit to the Public

The Hearing Examiner specifically found that

> "the advantages to the public of through service in an enlarged territory, reduction of the imbalance in the flow of traffic, more effective utilization of equipment and facilities, improvements in safety programs, and substantial savings in operating costs are consistent with the public interest and 'will assist in effectuating the over-all transportation policy.'" (A122)

The Commission also found that centralized control of the various operations in Transcon would permit the establishment of more through service and improved service, all to the benefit of the public. (A101-102) These findings are very similar to those of the Commission in the *McLean* case, which were held by this Court to satisfy the "public interest" requirement of section 5(2). In *McLean* the Commission had found that the proposed consolidation would result in "improved transportation service, greater efficiency of operation and substantial operating economies (321 U. S. at 88), *e.g.* "Through movement of freight would be simplified and expedited, equipment would be utilized more efficiently, terminal facilities improved . . . and substantial operating economies would be achieved." (321 U. S. at 72).

There is clearly substantial evidence in the record to support these findings that the acquisition would result in improved transportation service. The evidence showed that common management and control by Transcon of the three carriers would (a) allow Transcon and the acquired carriers to institute, modify or delete through bus service in a manner which is responsive to public demand, and in a manner which is more competitive to Greyhound than was

previously possible (R. 53-Tr. 45, 46; 353-355; 402-403; 782, 783); (b) allow Transcon and the acquired carriers to operate through bus schedules, even though segments thereof are unprofitable. Formerly, the carrier owning the unprofitable segment would often refuse to participate (R. 53-Tr. 431; 670-672). This was one of the primary competitive weaknesses in the Trailways System of separately owned carriers in attempting to meet Greyhound's competition effectively (R. 53-Tr. 403); (c) eliminate duplications in advertising, releasing the savings to be used in additional advertising (R. 53-Tr. 46, 47; 782, 783; 891, 892); (d) through Transcon's financial backing enable the acquired carriers to build new terminals and modernize old ones to an extent not previously possible (R. 53-Tr. 435-437; 891); (e) consolidate duplicate machine accounting operations located at Washington, D. C., Charlottesville, Va. and Charlotte, N. C. producing an annual savings of $75,000 to $100,000 (R. 53-Tr. 48; 390; 400; 599, 600); (f) enable the acquired carriers, through the mass purchasing ability of Transcon to achieve substantial annual savings on the purchase of everything from bus tickets and baggage claim checks to diesel engines (R. 53-Tr. 47; 389; 783; 463-465; 598-599; 891); (g) achieve a one time reduction of inventory of vehicle spare parts of $1,000,000 (R. 53-Tr. 599); (h) result in an increased equipment utilization which, in turn, would allow the over-all size of the fleet of each of the acquired carriers to be trimmed (R. 53-Tr. 47, 48; 783); (i) result in traffic improvement for Transcon's western segment (R. 53-Tr. 46); (j) result in savings by the elimination of certain common facilities (R. 53-Tr. 48); (k) make available to the entire system additional personnel (R. 53-Tr. 47; 400); (l) strengthen the financial position of all the companies involved (R. 53-Tr. 47; R. 53-Exhs. 19, 20, 21, 24, 25,

26); (m) achieve uniformity in equipment and service (R. 53-Tr. 387-389); (n) effect savings through use of Transcon's self-insurance program (R. 53-Tr. 402); and (o) upgrade the safety program of the acquired companies (R. 53-Tr. 402).

In the face of this evidence there is simply no basis at all for Interstate's assertion that the record " * * * is even deficient in * * * evidence relating to expected economies and savings resulting from the proposed acquisitions." (JS 20) The Commission did not have to find to authorize the acquisitions, as Interstate contends at pp. 19 and 20, that the acquired companies were not providing adequate service, or that the acquired companies were in "poor financial condition", or that acquisitions were "required" to preserve the status of the acquired companies. (JS 19) The Act, contrary to Interstate's assertions, is "to be administered with an eye to improving transportation facilities, not merely to preserving existing arrangements or competitive practices." *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86 (1944).

Second: The Impact on Competition.

The Commission focused squarely on the question of the extent to which the proposed acquisitions would affect competition. It found:

> "Here, the proposed transactions will not result in a reduction of competition, but will substantially increase competition, which factor is pointed out in the report of the examiner. While there (546) is some duplication in operations of Transcon and the carriers involved in the proceedings herein, essentially between Washington, D.C., and Baltimore, Md., Philadelphia,

Pa. and New York, N.Y., and to some extent between Tenn T and CT in Tennessee comprising, at most, some 350 miles of a total of 10,860 miles operated by the carriers to be controlled, or about 3.5 percent, there is virtually no duplication in service provided." (A64-A65)

The record evidence amply supports this finding.

The acquired carriers did not compete with themselves, or with Transcon. They stood to each other and to Transcon in an end-to-end, not parallel or duplicative, relationship. The competition was with Greyhound's parallel service. Trailways of New England (T.N.E.), a subsidiary of Safeway and Virginia, operated from Portland, Maine to New York City, N.Y. via Boston, Mass. (R. 53-Exhs. 39, 92, 94). It had Greyhound competition over all its major routes. (R. 53-Exh. 95, R. 53-Tr. 722) Transcon had no routes in the area, but connected with it at New York City, N.Y. (R. 53-Exhs. 1; 39). Safeway operated from New York City, N.Y. to Washington, D.C. through Baltimore, Md. (R. 53-Exhs. 39, 86) It had Greyhound competition over all of its major routes.* (R. 53-Exh. 88, R. 53-Tr. 607) Transcon's route paralleled that of Safeway between Philadelphia and New York, but the operations were entirely different because Transcon was restricted on that route to long haul traffic, either originating or destined to Harrisburg, Pa. or points west thereof. (R. 53-Tr. 331, 332) Virginia operated from Washington, D.C. to Durham, N.C. and west to Cincinnati, Ohio. (R. 53-Exhs. 39, 46, 47) It had Greyhound competition over all its major routes. (R. 53-Exh. 49, R. 53-Tr. 509, 510)

* Between Washington and New York both Safeway and Greyhound operate 48 scheduled trips per days in each direction (R. 53-Tr. 607).

Transcon had no routes in the area served by Virginia but connected with it at Washington, D.C. (R. 53-Exhs. 1, 39). Queen and its various partially and wholly owned subsidiaries operated extensive local routes in North and South Carolina and Georgia, extending west to Nashville, Tenn. and south to Lake City, Fla. (R. 53-Exhs. 39, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117). These companies had Greyhound competition between all major points served. (R. 53-Exhs. 126, 127, R. 53-Tr. 1042-1045) Transcon had no routes in the area served by Queen except between Nashville and Knoxville, Tenn. (R. 53-Exh. 39) The actual route duplication was between Sparta and Knoxville and was approximately 100 miles (R. 53-Tr. 344). It connected with these companies at Nashville, Knoxville and Chattanooga, Tenn., and at Atlanta, Georgia (R. 53-Exh. 39).

Interstate's contention that the acquisitions would eliminate competition between the existing Transcon route from Dallas to New York via St. Louis and a southeastern route from Dallas to New York via Atlanta is contrary to fact. The record shows that there was no competition between these two routes, for there was not a single schedule in effect for through service from New York to Dallas via Atlanta (R. 53-Exh. 48). The closest any one of the acquired carriers came to Dallas is Nashville, Tenn., some 700 miles east of Dallas. Transcon and the acquired carriers were not operating a single through bus schedule between New York and Dallas over the routes of the acquired carriers in 1964 (R. 53-Exh. 48). Transcon was operating four schedules per day over its St. Louis route. (R. 53-Tr. 560) One of the benefits of the merger is the establishment for the first time of an efficient through service from New York to Dallas via Atlanta, served by the many feeder lines of

the three acquired carriers through the southeastern part of the United States.

Thus, the evidence demonstrates beyond question that the acquisitions would, because of the end-to-end relation of the acquired carriers to each other and to Transcon, have an absolutely minimal adverse impact on competition. But the Commission's appraisal of the competitive impact of the acquisitions did not rest on this finding alone. It also considered the impact of the acquisitions on competition with Greyhound, whose routes parallel those of the three carriers and Transcon, and which the Examiner described as "the sole real competitor of Transcon and the subject carriers" (A116). The Examiner found:

> "The variety of financial and operating data discussed in detail earlier herein is convincing that Greyhound is the dominant (25) for-hire motor-bus carrier of passengers on the national scene. Approval of the transactions would extend Transcon's operations, through the subject carriers, into the northeastern seaboard and would intensify, not create, competition there and in other areas of the country. Compare Greyhound Corp.—Control—Florida Motor Lines Corp., supra. There is little likelihood that Greyhound's operations would be jeopardized thereby." (A118)

The Commission pointed out that "the proposed transactions will not result in a reduction of competition, but will substantially increase competition, which fact is pointed out in the report of the examiner." (A64)

The Commission's conclusion that the acquisitions would materially increase and strengthen competition with Greyhound in the areas served by the three carriers, rests on

substantial evidence. Not only do the routes parallel Greyhound, but the vesting of control of the three carriers in Transcon will achieve greater efficiency and enable the establishment of through routes with greatly improved through service. The through schedules and the long haul traffic they produce, have become the "lifeblood" of all intercity bus carriers. (R. 53-Tr. 346-347) As an example, 85% of Virginia's equipment is operated in these through bus schedules (R. 53-Tr. 429). Even Interstate's witnesses conceded that "you could get much better efficiency in one big operating unit than you can in 10 smaller ones, no matter how closely they tried to operate." (A125). And there was substantial evidence of the inability of the three carriers to coordinate their schedules so as to provide effective competition to Greyhound. For example, there was no through service via Atlanta from New York to Dallas. Such a schedule did not exist in 1964 because certain segments would operate at a loss unacceptable to the carrier operating that segment. The mere fact that the carriers were members of Trailways did not ensure establishment and coordination of through services. A through service requires agreement as to the number of buses, type of equipment, number of bus miles to be purchased by each carrier not contributing equipment to the pool, and most important, time schedules over segments of the through routes. (R. 53-Tr. 89, 32, 33). The evidence showed it was often difficult, if not impossible, to reach agreement because one segment of the route proved unprofitable for the carrier operating on that segment. (R. 53-Tr. 403, 1148, 1149, 672.) The Examiner took specific note of this problem at A101.

Third: The Appraisal of the Competitive Impact and the Public Benefit of the Acquisitions.

The Commission decided that the public interest would benefit to a greater extent from strengthening the weaker arm of the existing duopoly in the industry to better enable it to compete with Greyhound, than from the continuance of the status quo with Transcon and the three carriers at a material competitive disadvantage with Greyhound. (A65).

This Commission decision is in accordance with a long standing policy of the Commission to develop and strengthen competition to Greyhound in the intercity bus industry. The policy of the Commission goes back to the very inception of its functions under the Motor Carrier Act of 1935. At that time, Greyhound was already well entrenched in the bus industry (R. 53-Tr. 1202-1203). The National Trailways Bus System (Trailways) was organized the year after the Motor Carrier Act was enacted. It was formed as a non-profit trade association by five railroad owned bus lines (R. 53-Tr. 24-25; 669) for the primary purpose, as the Examiner indicated, of fostering competition with "Greyhound's nationwide motorbus operations" (A80; R. 53-Tr. 670). To create a uniform public image, its members adopted "Trailways" as a common trade name; adopted uniform paint schemes and bus markings; established joint terminals; and attempted to coordinate advertising, purchasing and other essential functions (R. 53-Tr. 24-32; 1149). The Commission's policy of fostering and strengthening competition as against Greyhound has been manifest in many decisions over a long period of time.

The Commission decided numerous cases adverse to Greyhound and favorable to Trailways carriers, based

on the need to strengthen Trailways as a competitor of Greyhound. This was done in view of the fact that the voluntary trade association, Trailways, was the only semblance of competition which existed. In each instance, the need to strengthen the Trailways system was cited. These cases took the form of so-called "bridge the gap" applications based on the need of individual Trailways carriers to reach termini at which other friendly Trailways carriers could provide an outlet, other than Greyhound, for its traffic. Even the railroad owned and supported carriers that originally formed Trailways in 1936 had no other way to compete with Greyhound for the vital long haul traffic.

As stated by the Commission in *Mt. Hood Stages-Extension-Salt Lake City,* 44 M.C.C. 535, 548:

> "Extension by applicant to Salt Lake City will enable Trailways members to reach, over lines of their own system, a territory thus far closed to them except through a competitive outlet [Greyhound] from which they have not had in the past, and cannot in the future expect a comparable interchange in the reverse direction."

During that period, the Commission granted numerous other applications on the grounds that approval would strengthen Trailways carriers in competition with Greyhound. See, e.g., *Bowen Motor Coaches-Extension-Tucumcari,* Docket No. MC-9259 (not printed); *Missouri Pacific Transportation Co., Extension of Operations,* 22 M.C.C. 321; *I and S Trailways, Inc., Extension-Knoxville, Tenn.,* 49 M.C.C. 872; *West Coast Bus Lines Common Carrier Application,* 32 M.C.C. 692; *West Coast Bus Lines, Extension of Operations-Stockton,* 48 M.C.C. 177; *Joel*

W. Wright et al.-Control-Queen City Coach Company and Smoky Mountain Stages, Inc.-Control-Georgia Florida Coaches, Inc., 50 M.C.C. 325.

Transcon was created in 1948, by an amalgamation of the operating rights and property of the Santa Fe Trail Transportation Company, Dixie Motor Coach Corporation and Continental Bus System, all Trailways carriers. In *A. C. Allyn and Co., et al.-Control; Transcontinental Bus System, Inc.-Control-Continental Bus System, Inc., et al.*, 50 M.C.C. 193 (1948), the Commission approved that amalgamation thus creating the nucleus which was over a period of time to grow into Greyhound's only national competitor.

Its growth up to and including the instant transactions has been wholly through the acquisition of other Trailways carriers sanctioned by the Commission because, e.g.:

> "Approval of the transaction would make available a more complete, efficient, and co-ordinated transcontinental bus service. * * * The service that would result as between the carriers would benefit both applicants and would make possible more effective competition by them as well as other Trailways members with the Greyhound system." *Transcontinental Bus System, Inc.-Control-American Buslines, Inc.*, 59 M.C.C. 233, 248. To the same effect see, e.g., *West Coast Bus Lines, Ltd.*, 50 M.C.C. 525 (1948); *Rio Grande Motor Way, Inc.*, 55 M.C.C. 31, 235, 58 M.C.C. 801 (1952); *Denver-Colorado Springs-Pueblo Motorway, Inc.*, 55 M.C.C. 31, 235, 58 M.C.C. 801 (1952); *Southern Bus Lines, Inc.*, 56 M.C.C. 803 (1949); *Valley Transit Lines*, 58 M.C.C. 805 (1952); *Rio Grande Motor Way, Inc.*, 59 M.C.C. 233 (1952); *Crescent Stages, Inc.*, 59 M.C.C. 491 (1953); *Central Bus Lines, Inc.*, 59 M.C.C. 805 (1953); *Smoky*

Mountain Stages, 70 M.C.C. 77 (1956); *Union Bus Lines, Inc., and Randolph Field Bus Company, Inc.,* 65 M.C.C. 803 (1956); *Bayshore Buslines, Inc.,* 65 M.C.C. 805 (1955); *Arkansas Motor Coaches, Ltd., Inc.,* 70 M.C.C. 809 (1956); *Midwest Buslines, Inc.* (Not Printed) (1960); *Tennessee Trailways, Inc.,* 87 M.C.C. 775 (1961).

All the above acquisitions by Transcon were of Trailways carriers, forging a real competitor for Greyhound by common ownership through Transcon of important segments of Trailways. In every case the Commission found that unity under Transcon would enhance the ability of the previously separate parts of Trailways to better compete with Greyhound.

While allowing Transcon to weld together the first and only semi-national competitor for Greyhound, the Commission, after 1948, continued its policy of strengthening other parts of the Trailways System.

In *Capitol Bus Company, Extension-Elmira-Wilkes-Barre,* 83 M.C.C. 559, the Commission stated:

> "If we were to deny Applicant the right to close the gap in its operations between Wilkes-Barre and Towanda, we would, as we said in an earlier case, 'merely be hampering the development of a competing system of transportation [Trailways] for the sake of protecting a single carrier from some diversion of traffic [Greyhound].'"

See also, e.g., *Capital Bus Company, Extension-Washington, D.C.,* 69 M.C.C. 447; *Tamiami Trail Tours, Inc.-Extension-Jacksonville-Canal Point, Fla.,* 84 M.C.C. 703;

Carolina Coach Company-Control and Merger-Norfolk Southern Bus Corp., 59 M.C.C. 681; *Safeway Trails, Inc.-Control and Merger-Quaker City Bus Co.*, 70 M.C.C. 377; *Safeway Trails, Inc. and Virginia Stage Lines-Control-Trailways of New England, Inc.*, 75 M.C.C. 179.

In the meantime the Commission has denied numerous applications by Greyhound on the grounds that approval would lessen the ability of Trailways carriers to compete with it. See, e.g., *Southwestern Greyhound Lines, Inc.-Merger-Arkansas Motor Coaches*, 39 M.C.C. 721; *Illinois Greyhound Lines, Inc.-Purchase-Southern, Ltd.*, 38 M.C.C. 641; *Southeastern Greyhound Lines-Control-Lewisburg Bus Lines, Inc., Georgia Stages, Inc., Crescent Stages, Inc.*, 40 M.C.C. 375, 45 M.C.C. 185; *Southwestern Greyhound Lines, Inc.-Extension-Lower Rio Grand Valley*, Docket No. MC-1510 (Sub. No. 59), noted at 78 M.C.C. 805; *Greyhound Lines, Inc.-Extension-Lincoln, Nebraska*, 99 M.C.C. 299; *The Greyhound Corporation-Control, Pacific Greyhound Lines-Control and Merger-Geronimo Lines, Inc.*, 56 M.C.C. 415.

The Commission did not create Greyhound, it inherited it. In 1935, the basic segments of the Greyhound system were already in place through varying degrees of stock ownership by The Greyhound Corp. Many Commission decisions since that time have merely allowed Greyhound to merge with its subsidiaries to provide more efficient operations or to buy additional shares in partially owned subsidiaries. See, e.g., *Central Greyhound Lines, Inc., Northland Greyhound Lines*, 25 M.C.C. 59 (1939); *Canadian Greyhound Lines, Ltd., and Toronto Greyhound Lines, Ltd.*, 35 M.C.C. 599 (1940); *Teche Greyhound Lines*, 36 M.C.C. 397 (1941); *Taho Greyhound Lines*, 37 M.C.C.

654 (1941); *Florida Greyhound Lines,* 40 M.C.C. 802 (1945); *Southern Kansas Greyhound Lines,* 45 M.C.C. 679 (1947); *Northeastern Missouri Greyhound Lines,* 50 M.C.C. 441 (1948); *Central Greyhound Lines, Great Lakes Greyhound Lines, Illinois Greyhound Lines, Ohio Greyhound Lines,* 55 M.C.C. 237 (1948); *Dixie Greyhound Lines, Florida Greyhound Lines, Northwest Greyhound Lines, and North Coast Greyhound Lines,* 56 M.C.C. 238 (1949); *Southeastern Greyhound Lines,* 57 M.C.C. 123 (1950); *Southeastern Greyhound Lines of Indiana,* 57 M.C.C. 808 (1951); *Pennsylvania Greyhound Lines, Pennsylvania Greyhound Lines of Virginia and Pennsylvania Greyhound Lines of Indiana,* 60 M.C.C. 803 (1954); *Capital Greyhound Lines,* 60 M.C.C. 804 (1954); *New England Greyhound Lines, Inc.,* 60 M.C.C. 804 (1954); *Capital Greyhound Lines,* 65 M.C.C. 809 (1955); *Central Greyhound Lines of New York,* 65 M.C.C. 810 (1955); *Northland Greyhound Lines,* 65 M.C.C. 816 (1956); *Pacific Greyhound Lines,* 70 M.C.C. 59 (1956); *Eastern Canadian Greyhound Lines, Ltd.,* 70 M.C.C. 806 (1957); *Southwestern Greyhound Lines,* 75 M.C.C. 339 (1958); *Northeastern Missouri Greyhound Lines,* 75 M.C.C. 339 (1958); *Atlantic Greyhound Corporation,* 80 M.C.C. 802 (1959); and *The Greyhound Lines, Inc.,* 93 M.C.C. 392 (1963).

In other acquisitions approved by the Commission for Greyhound, the competitive impact on Trailways carriers was closely considered, and protective conditions imposed when warranted. Recently, at the request of a Trailways carrier a number of those applications were reopened, and it was held by the Commission that Greyhound had not lived up to its original commitments before the Commission to protect the Trailways carrier. The Commission ordered Greyhound to live up to the pledges made in these cases

some years before or forfeit the certificates thereby gained. *Mt. Hood Stages, Inc., Petition for Modification-Greyhound Mergers,* Docket No. MC-F-9136 (1968).

Despite Commission policy which had fostered the growth of Trailways and Transcon, Greyhound was in 1964 the only intercity bus carrier operating on a national basis. The respective posture of Greyhound and Transcon in the year Transcon sought Commission approval of the acquisition of Virginia, Safeway and Queen was as follows. In 1964, Greyhound dominated the industry, generating $258,954,000 or 63% of its total passenger revenues as opposed to Transcon and subsidiaries, generating only $46,726,000 or slightly over 11% of those revenues. (R. 53-Exh. 74). Greyhound in 1964 held certificates to operate over 92,000 route miles (R. 53-Tr. 1205), owned over 5,000 buses (R. 53-Exh. 156), and had 24,000 employees. (R. 53-Exh. 155). In 1963, Greyhound aggregated 447 million bus miles (R. 53-Exh. 74) and over 10 billion passenger miles. (R. 53-Exh. 156). Greyhound's routes are spread throughout the continental limits of the United States. (R. 53-Exh. 147). In 1964, Transcon, Greyhound's only major rival, operated in only 32 states plus the District of Columbia. (R. 53-Exhs. 1, 39). Of those 32 states, 10 had little route coverage.* Transcon had no routes at all in 14 states,** which included the entire east coast. (R. 53-Exhs. 1, 39). In all it had 45,575 route miles. (R. 53-Exh. 148). In 1963, it operated 97 million bus miles. (R. 53-Exh. 74). In terms of revenues, Transcon was 18% the size of Grey-

* Indiana, Kentucky, Michigan, Montana, New York, Ohio, Oregon, Pennsylvania, South Dakota, and Washington.

** Connecticut, Delaware, Florida, Idaho, Maine, Minnesota, New Hampshire, North Carolina, North Dakota, South Carolina, Vermont, Virginia, West Virginia, and Wisconsin.

hound; in terms of bus miles operated, it was 21.5% the size of Greyhound.

At the time of these transactions, Transcon's biggest single deficiency which kept it from being Greyhound's only national competitor, was the fact that it had no operations whatsoever from Maine to Florida on the populous east coast except for one long haul route through Pennsylvania into New York City. (R. 53-Exhs. 1, 39).

In the Commission's judgment, authorization of the acquisitions would diminish Greyhound's monopoly position. (A64-66). As the Examiner found, "a duopoly would supplant a monopoly in intercity passenger transportation" (A122). The Commission's decision, based on substantial evidence, was that the acquisitions would improve transportation and would implement the Commission's long standing policy of strengthening competition against Greyhound.

The instant acquisition achieves the dual objectives of the national policy as reflected in Section 5 of the Interstate Commerce Act and in the Motor Carrier Act of 1935: improved transportation service without diminution of competition. There can be no question that for the reasons set forth above at pages 18 to 25, there was substantial evidence to support the Commission's decision. Accordingly, the wisdom of the decision is not for this Court to review. "[I]t is not for the courts to weigh the evidence introduced before the Commission." *Assigned Car* cases, 274 U.S. 564, 580 (1927). In passing on orders of the Commission, the courts " * * * may not substitute our judgment or discretion for that of the Commission on questions of credibility, weight of evidence, and inferences to be drawn from the

facts deemed proven." *William N. Feinstein & Co.* v. *U.S.*, 209 F. Supp. 613 (S.D.N.Y. 1962) (single judge), *aff'd*, 317 F. 2d 509 (2d Cir. 1963).

Fourth: Interstate's Claim That the Commission Has Created a Duopoly and Thereby Foreclosed the Creation of a "Third Force" in the Intercity Bus Industry.

Throughout Interstate's brief, there are repeated references to the creation of a so-called "third force" in the bus industry. Interstate says it would consist of Queen, Tamiami Trails, Carolina Coaches, Virginia and Safeway and their subsidiaries. The use by Interstate of the label "third force" is highly misleading, for a combination of Queen, Virginia and Safeway would not create a "force" at all, at least not a force which would have any competitive impact on the operations of either Greyhound or Transcon. Its operations would not be national in character, but would be limited to the eastern seaboard. It would be wholly dependent on either Greyhound or Transcon for an outlet for the west bound traffic it generated and to receive vital revenues for the transportation of east bound traffic generated by Greyhound or Transcon. Greyhound having complete routes on the eastern seaboard and Transcon having none, it follows that only Transcon would feed it east bound traffic, making that new unit and Transcon wholly dependent on each other for east-west traffic in the same fashion that Transcon, Safeway, Virginia and Queen were already dependent on each other. Thus, the form would have changed while the substance remained the same. The public would still be deprived of the many benefits which the Commission found would flow from the amalgamation of these already dependent natural allies.

As we have seen, a combination of these three carriers would not under any circumstances compete with Transcon. And such a combination could be at a distinct disadvantage because of its regional character and limited size in competing with Greyhound. Thus, the so-called "third force" is a wholly illusory concept.

Interstate's arguments about the "third force" merely raise in a different form the question of whether the public interest in improved transportation would be better served by permitting Transcon to control Queen, Safeway and Virginia thereby enabling them to better compete with Greyhound, or, by continuing the status quo, foregoing the improvements in service inherent in control in Transcon, and continuing with Transcon and the three carriers at a decisive competitive disadvantage to Greyhound. The Commission faced this question squarely. (A65-66). It chose the first alternative on the basis of evidence in the record that would literally permit no other choice. As we have seen, the Commission concluded that a viable duopoly which would increase competition with Greyhound was preferable to the continuance of the status quo, with Transcon and the three carriers at a material disadvantage as against Greyhound.

Interstate's charge that the Commission failed to hear evidence or argument on the "third force" is just not true. One-hundred and twenty-five pages of the record (10% of the total) were devoted to evidence adduced by Interstate on direct and cross-examination respecting the so-called "third force." Mr. Burt cross-examined Strayhorn (R. 53-Tr. 367-378), Jessup (R. 53-Tr. 437-443), Trice (R. 53-Tr. 560-568), Walsh (R. 53-Tr. 612-628), Browning (R. 53-Tr. 733-766), Moore (R. 53-Tr. 973-979) and Quattle-

baum (R. 53-Tr. 1069-1097) relative to the "third force." He presented his own witness Rempe in addition (R. 53-Tr. 1164-1198).

What the Commission did refuse to consider was evidence of a third force *under Interstate's control* (A65). In refusing to go into this, the Commission was entirely correct, for Interstate had failed to file an application for control of any of the three carriers (A65). Section 5(2) requires the filing of an application for authority to acquire control of a carrier as a condition to the Commission's consideration. *Canadian Pacific Ry. Co.* v. *United States,* 158 F. Supp. 248 (D. Minn. 1958). Control applications may be and have been filed in the absence of a contract to acquire control. *See,* e.g., *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959); *Canadian Pacific Ry. Co.* v. *United States of America* (*supra*). In the absence of an application by Interstate to acquire control of Queen, the Commission was under no duty to consider the impact of a "third force" which it claims "it would create." (A65) Indeed, the Commission would have been without power to adjudicate or determine, in the absence of an application by Interstate, whether Interstate's creation of a "third force" would be in the public interest. *See,* e.g., *Canadian Pacific Railway Co., supra.*

There is a further fallacy in Interstate's "third force" argument, i.e., the claim that Queen was the key link in the "third force". This is simply not the fact. Queen can be, and on some through bus schedules, is by-passed on the north-south routes of Carolina Coach Company, Carolina Scenic Stages, Service Trailways, Tamiami Trailways and Smoky Mountain Stages. (R. 53-Exh. 87—Runs 6-9) Queen can be and is by-passed on northeast-southwest movements

on the routes of Tennessee Trailways and various of the Continental companies. (R. 53-Exh. 87—Runs 12-14) Obviously if Queen* were the key, Transcon would not, as it did, contract to purchase both Safeway and Virginia before it had any commitment from the Queen shareholders to sell Queen. And Transcon was obligated, subject only to Commission approval, to acquire Virginia and Safeway regardless of what happened to Queen.

Fifth: Interstate's Claim That Transcon's Pre-Approval Acquisitions Barred the Commission From Approving the Acquisition of Queen Under Section 5.

At pages 57 through 64 of its Jurisdictional Statement, Interstate makes the argument that the purchase prior to Commission approval by Transcon or its subsidiaries of 21% of the stock of Safeway, 4% of the stock of Virginia and depositary receipts representing 10%** of Queen stock coupled with the escrow arrangements covering the stock of Safeway, Queen and Virginia pending Commission approval precluded the Commission from approving Transcon's applications under Section 5 of the Interstate Commerce Act. Interstate's argument is based, (1) on the claim that the pre-approval purchases and the escrow arrangements violated Section 7 of the Clayton Act and, (2) because of the violation of Section 7 of the Clayton Act, the Commission could not approve the acquisitions under Section 5 of the Interstate Commerce Act. There is no substance to either of these points..

---

* Queen had an interest in Carolina Scenic, Smoky Mountain Stages and Tennessee Trailways which did not amount to control in any instance.

** Actually, the depositary receipts bought by Transcon amounted to receipts representing slightly over 9% of Queen's shares.

(1) Neither the acquisition of stock in Safeway or Virginia, the acquisition of Queen depositary receipts, nor the escrow arrangements violated Section 7 of the Clayton Act for none of these steps in any way lessened or tended to lessen competition. Acquisition of minority interests in these three companies (21% of Safeway, 4% of Virginia and 9% of Queen) did not carry with it either control in the companies or a voice in their management. All three companies were closely held and thus such minority holdings would not, of themselves, constitute control. The Commission so found. (A60). During the escrow period, pending Commission approval, Transcon had no representation on the Board of Directors in any of the three companies (R. 53-Exh. B in Application, Docket No. MC-F-8744; Exh. B, bb in Application, Docket No. MC-F-8774, pp. 6, 7). Here the operation of the three companies continued during the pendency of the escrow arrangement independently of Transcon. For example, Safeway, Queen and Virginia retained control of their terminals (R. 53-Tr. 362, 363, 365); there was no amalgamation of administrative services of Transcon, Safeway and Virginia in such matters as maintenance, purchasing, advertising etc.; Safeway, Virginia and Queen each maintained its own garage facilities (R. 53-Tr. 595-597; 456-459; 1063); Virginia and Safeway maintained different purchasing operations from Queen (R. 53-Tr. 598, 1063) and separate advertising (R. 53-Tr. 782-783). Each operated its own accounting system (R. 53-Tr. 599-601). And as we have seen, even had there been an amalgamation in their operations under Transcon's control during the escrow period, there would have been no lessening of competition because of the end-to-end relationship of the three carriers with each other and with Transcon.

The only effect of the escrow arrangement was to subject each share of Queen stock through the medium of the depositary receipts to the terms of the contract of sale. It had no effect whatsoever on the operations of the companies. And it did not in any way give Transcon control or a voice in their management. Accordingly, there simply is no basis whatsoever for contending that the escrow arrangement or Transcon's acquisition of minority stock interests in the three companies violated Section 7 of the Clayton Act. This of itself is sufficient to distinguish *Denver and Rio Grande Western R. Co.* v. *United States,* 387 U.S. 485 (1967), where this Court concluded that acquisition by Greyhound of 500,000 shares (ca. 20%) of Railway Express would carry with it a likelihood of a lessening of competition.

(2) In any event, the measure of the legality of the pre-approval acquisitions and the escrow arrangements is not Section 7 of the Clayton Act, but rather, Section 5 of the Interstate Commerce Act. In this case, unlike *Denver and Rio Grande,* Transcon's applications are expressly premised on section 5 as well as section 20. Thus, as this Court held in *Denver and Rio Grande,* the Commission must consider the anti-competitive impact, if any, of the proposed consolidations. This, as we have pointed out at pages 21 to 25 above, the Commission has carefully done. There is simply no support whatsoever under *Denver and Rio Grande* or in any other case for Interstate's novel contention that Section 7 of the Clayton Act should displace Section 5 of the Interstate Commerce Act as the measure of the validity of a proposed consolidation among motor carriers subject to Commission approval.

POINT III

The District Court Correctly Held That the I.C.C. Orders Were Not Procured by Fraud.

In numerous instances Interstate charged before the I.C.C. that the testimony of Transcon's President, Mr. Moore, its Financial Vice President, Mr. Scheitel, and Queen's President and shareholder, Mr. Love, was false. These charges were also made in the three-judge district court below, and are repeated here in Interstate's jurisdictional statement.

The essence of Interstate's claim is: (1) that at the time of its May 16, 1964 contract to purchase all shares of Queen, Transcon secretly agreed with one or more Queen shareholders to purchase for cash a number of their Queen depositary receipts, (2) that such an agreement to pay cash deprives the acquisition of its tax-free nature as a "Type B" reorganization and would, if known to the Internal Revenue Service, result in the imposition of a capital gains tax on all Queen shareholders, (3) that the actual purchase of such receipts by Highway, a Transcon subsidiary, constituted the acquisition of control of Queen by Transcon prior to I.C.C. approval in violation of Interstate Commerce Act § 5(4) and in violation of Clayton Act § 7, and (4) that Messrs. Scheitel, Love and Moore, among numerous others, conspired to withhold knowledge of both the alleged secret agreement and the actual purchases from the I.C.C. by committing perjury at the hearings before the I.C.C.

Plaintiff's claims with respect to secret agreement, prior unauthorized acquisition of control, and fraud committed

to conceal these matters, are completely unsupported by any evidence, and are contradicted by substantial evidence that was credited by the hearing examiner, the Commission, and the District Court.

A. *There Was No Evidence of a Secret Agreement to Pay Cash*

In support of its claim of a secret agreement by Transcon to pay cash for Queen shares or depositary receipts, Interstate relies heavily on an April 28, 1964 letter from Mr. Love, the President of Queen, to Mr. Moore, the President of Transcon. This letter contained a proposed contract under which Transcon would exchange eight of its own shares for each share of Queen and for each share of GRIC (R. 53-Exh. 103). The letter states:

> "Some of our stockholders wanted a minimum guaranty of cash and I enclose an offer by Transcontinental to buy back this stock at $31.25 per share. This is an integral part of our offer to sell the stock of Queen and General Realty and if it is not accepted the offer contained in the signed Contracts is withdrawn."

The letter notes that a condition of the proposed contract is that a satisfactory employment contract be worked out, and the letter also expresses the need for an exchange of stock of Eastern Carolina Corporation and a purchase contract with Transportation Supply Corporation. The proposed contract would require the Queen shares to be held by a bank in escrow until consummation of the transaction after I.C.C. approval, but would make no provision for the issuance by the escrowee bank of depositary receipts for such shares.

As the District Court properly noted (A12) the testimony was clear that the April 28, 1964 offer was rejected by Transcon (R. 53-Tr. 848) and that the final purchase agreement dated May 16, 1964 did not include any buy-back arrangement (R. 53-Exhs. 14-15). The contract actually entered into as of May 16, 1964 differs materially from the April 28, 1964 proposal, in that the exchange ratio is 7.25 to 1, instead of 8 to 1 (sec. 1.1), in that transferable depositary receipts are to be issued for Queen shares by the bank (secs. 2 and 4), and in that no Transcon shares are to be delivered by Transcon to the bank until after the I.C.C. approval has been obtained (sec. 6.1(b)).

Interstate's argument that there was a secret agreement to pay cash rests largely on the inference it seeks to draw (at JS 11-13) from the fact that each of the other three requirements mentioned in the April 28, 1964 letter was fulfilled, in whole or in part, by resolutions passed at the May 21, 1964 meeting of Queen's Board (R. 53-Exh. 101). The fact is that the fourth requirement, the desire of one or more shareholders for cash was also raised, and disposed of in a proper manner, at the May 21, 1964 Queen Board meeting, the minutes of which recite:

> "L. A. Love then announced that Mrs. Margie Rowland desired to sell the stock owned by her family for $250.00 cash. James A. Hardison, Jr. indicated a willingness to purchase Mrs. Rowland's stock." (R. 53-Exh. 101).

Presumably Mrs. Rowland was satisfied that her stock could probably be sold for at least $250 per share cash. The fact is that Transcon subsequently bought her depositary receipts for $290 per share. If there had been a secret agreement by Transcon to buy Queen City stock at $290, obvi-

ously Mrs. Rowland would not have desired to sell the shares for $250. Equally obviously, Transcon would not have paid $290 for Mrs. Rowland's stock if there had been an agreement to purchase at $250, as Interstate contends at pages 11-13 of its Jurisdictional Statement.

Since the actual May 16, 1964 contract, unlike the April 28, 1964 proposal, gave the shareholders marketable depositary receipts, there was, moreover, no need for a side agreement guaranteeing a minimum cash price. As Mr. Scheitel testified:

> "The depositary receipts were issued on the basis that they were marketable, and if they could find find a market, fine". (R. 53-Tr. 200).

Mr. Scheitel went on to testify that Transcon had suggested to Queen shareholders the possibility that if they wanted to sell their depositary receipts Goodbody & Company, which had made a market in Transcon stock, might be interested (*id.*).

The suggestion that there would be a market for the depositary receipts was eminently reasonable. Transcon's stock was actively traded over the counter, and the prospect of Commission approval of the proposed acquisition of Queen would generate a market for depositary receipts representing Queen stock which would then be convertible into Transcon stock.

A key part of Interstate's argument that there was a secret agreement rests on the contention that such an agreement was necessary to solve a so-called "dilema" [sic] facing Transcon (JS 13). The dilemma is said to have been posed by the need to satisfy the demands of some of the selling stockholders for cash and at the same

time preserve the tax-free character of the transaction allegedly as part of a "B" reorganization. The fact is that there never was any such dilemma as Interstate claims and, accordingly, there never was any such need or motive to make the alleged secret agreement. If Transcon had been concerned that the payment of cash for the depositary receipts would jeopardize the tax-free status of the "B" reorganization, it would have been a simple matter to have cast the acquisition in the form of a statutory merger under Section 55-108 of the North Carolina Business Corporation Act which would have enabled Transcon to exchange stock to those sellers (not less than 51%) wishing stock without tax consequences under Sec. 368(a)(1)A, 354 and 361 of the Internal Revenue Code of 1954, as amended, and pay cash to the balance. The merger could have been effected with the consent of only 51% of the Queen stockholders and Transcon could then, pursuant to Section 368 (a)(2)(C), put the Queen business into a subsidiary, all without tax consequence to the Queen stockholders. (64a-65a, R. 64, ¶ 12). The result would have been precisely the same as was achieved under the so-called B reorganization. And since only 9% of the Queen shareholders sold their depositary receipts, far more than the 51% of Queen stock necessary to effect a statutory merger was available.

There is additional and compelling circumstantial evidence against the existence of a secret agreement for the cash purchase of the depositary receipts. The purchase of the depositary receipts representing less than 10% of Queen's outstanding stock was made in 14 different transactions over a 14-month period from June 15, 1964 to August 23, 1965, both before and after Mr. Burt informed the Commission that Transcon was buying the depositary receipts for cash. The sales were made at varying prices ranging

from $241.25 to $290.00 a share. The varying prices bore no constant relationship to the market price of Transcon stock; the prices were at discounts varying from 5% to 17% from the market price of Transcon stock (A167). An essential element of any agreement for the sale of stock would be the price. But it is clear from the actual sales that there could have been no agreement as to price. From this it is clear that there could not have been an agreement for Transcon to pay $250 per share as Interstate asserts at JS 11-13, or an agreement to pay any other amount.

Moreover, Interstate knew at the time of the hearing the names of the depositary bank and the brokers who handled certain sales, and that Mr. Love's son had sold some depositary receipts through an acquaintance at First Securities Corporation (A172-A173), but it made no effort to call any of them as witnesses at the hearing.

The circumstantial evidence recited above of the lack of any secret agreement is corroborated in the uncontradicted clear and convincing testimony of all of the witnesses who testified on this subject. Mr. Love (A172), Mr. Moore (A175), Mr. Scheitel (A168-A169) all testified that Transcon had made no prior commitment to make a market in Queen City depositary receipts. The Commission was amply justified by the corroborative circumstantial evidence in crediting this testimony.

B. *There Was No Reason for Transcon to Conceal Highway's Acquisition of Queen Depositary Receipts, and No Concealment in Fact*

There is no merit to Interstate's charge that the acquisition by Highway of 9% of the depositary receipts for Queen shares constituted a prior unauthorized control in violation of Interstate Commerce Act § 5(4), and that

Transcon's officers and General Counsel conspired to withhold knowledge of these purchases from the I.C.C. (JS 15, 26-36).

Transcon's original application to the I.C.C. for control of Queen was filed on May 7, 1964 and did not reveal Highway's acquisition of the depositary receipts, since the first of these purchases took place a month later on June 15, 1964 (A167). Within a week after the hearing, when Highway's purchases of depositary receipts amounted to 1,387 (about 6%), Mr. Goff, Transcon's General Counsel, furnished the I.C.C.'s Bureau of Enforcement with all records relating to Highway's purchases of these depositary receipts (R. 53-Reply of Transcon, 11/5/65, p. 5; Reply of Transcon, 12/27/65, p. 12; Reply of Transcon, 2/14/66, p. 35; Answer of Transcon, 8/9/65; Reply of Transcon, 1/24/66).

The hearing examiner (A126, n. 15), the I.C.C. (A55, A60), and the District Court (A14) each had full knowledge of the fact that Transcon's subsidiary, Highway, had ultimately purchased 9% of the Queen depositary receipts, and each held that this did not constitute a prior unauthorized acquisition of control (A14, A28, A60, A126-127).

Queen stock was very closely held (see list of shareholders on May 16, 1964 contract, R. 53-Exh. 14). It is virtually inconceivable that Highway's ownership of less than 10% could constitute control under these circumstances. (See pp. 38-39, *supra.*)

Transcon had in 1963 bought 21% of Safeway stock, and it never occurred to Interstate or Greyhound or anyone else to suggest that this 21% block might constitute control (A175).

On May 13, 1964, several months before the hearing before the I.C.C., Transcon moved that Service Coach Lines be dismissed as a carrier to be controlled in Docket MC-C-8744 on the ground that 33⅓% of the stock of Service did not constitute control. It is inconceivable that a short time later numerous individuals would conspire to commit perjury in order to conceal from the hearing examiner the fact that a subsidiary of Transcon had acquired Queen depositary receipts amounting at that time to only 6% of the outstanding shares.

There was no tax reason for Transcon to conspire to withhold information as to Highway's purchases of depositary receipts from the Commission. The acquisition of Queen depositary receipts by Highway was revealed to the Internal Revenue Service (e.g., 62a Drysdale aff. ¶6, R. 64) and was considered by Queen's tax counsel to present no serious tax problems, for the reasons which he stated as follows in his affidavit:

> "When I first learned of the purchases of the depositary receipts by Highway, I recognized that there was a possibility that the Revenue Service would consider these to be purchases by Transcon; although, in my view, they were not. While there are many Internal Revenue Code provisions under which stock owned by one party is treated as being owned by another related party, none of them was applicable to the case under consideration. It was also my view that if the Revenue Service did raise a question about the Highway purchases, the problem could be solved simply by having Highway dispose of the depositary receipts before the closing. I reasoned that if this were done, all of the Queen stock would be acquired by Transcon solely for

Transcon voting stock, and any possible Service objection on this score would be removed. I so advised Mr. Warren Goff, general counsel for Transcon, in discussing the matter with him on the telephone. It did not prove necessary, however, for Highway to dispose of the depositary receipts since the Revenue Service did not consider the purchase of depositary receipts by Highway to be attributable to Transcon and issued a favorable ruling on the transaction.

"The views expressed in paragraphs 7, 8 and 9 above are concurred in by two of my partners, each of whom held an important position in the office of the Tax Legislative Counsel, Treasury Department, which plays an important role in the drafting of tax legislation and Treasury Regulations" (63a-64a R. 64, ¶¶ 9, 10).

It is only by altering the record testimony, by deleting material portions that provide necessary context, and by inserting its own words, that Interstate is able to make its claims of perjury. Thus the testimony of Mr. Scheitel, as set forth by Interstate at page 28 of its Jurisdictional Statement appears to constitute a denial by Mr. Scheitel that he knew who bought some Queen *"depositary receipts."* If that was his testimony, it would indeed be false. The actual transcript (A168-A170) does not show, however, that he made such a denial. Although questions expressly directed to depositary receipts had been asked of Mr. Scheitel (A168-A169) the actual question involved here was directed to "Queen City stock" (A170). The context of the question shows the questioner apparently wanted to know whether any Queen stock had been marketed prior to the making of the May 16, 1964 contract, since such information would have at least tangential relevance to Transcon's

reasons for directing Queen shareholders to Goodbody & Company as a possible market for their depositary receipts (A168). The context of the question in answer to which Interstate claims the false testimony was given is extremely important and is as follows:

> "Q. Well, if—you will concede that if this transaction is not approved by the Commission, what Goodbody & Company is making a market in is not Transcontinental stock, but in *Queen City stock*, for which there is no market? A. I don't know that they are making a market in *Queen City stock*.
>
> (203) Q. But you know that *some* has been sold. A. I don't know who bought it.
>
> Q. Pardon me? A. *Queen City*—repeat your question, please.
>
> Q. You know that some has been sold? A. I was told some was sold." (Emphasis added)

It is most significant that Scheitel's answer ending with the words "Queen City stock" is immediately followed by the question: "But you know that some has been sold?" The word "some" plainly refers to "Queen City stock," and Scheitel apparently so understood it. If Mr. Scheitel construed the question in this manner or if he was not sure of the question, as the record indicates by what immediately followed Scheitel's allegedly false answer, there was no perjury. Interstate in its Jurisdictional Statement has deleted Scheitel's testimony ending with the words "Queen City stock" and substituted in place thereof a question and answer which ended with the words "the depositary receipts." After this bit of surgery, the record, according to Interstate, looks like this:

"'Q. You at no time discussed with any member of the Love family, or any other principal stockholder—there are five principal stockholders of Queen—the relative amount of discount that would be available to them at Goodbody and Company, that it would be ten or fifteen percent over the equivalent market price of shares of Transcontinental Bus System? A. I don't —we didn't even—there wasn't any assurance on our part at all that there was going to be a market for the depositary receipts.' (id. at A169)

'Q. But you know that some [depositary receipts] has been sold? A. I don't know who bought it.' (id. at A170)"

What Interstate has done is to delete eight questions and answers and to add "[depositary receipts]" and thus has deliberately juxtaposed a question directed at "depositary receipts' with an answer directed at "Queen City stock." Thus Scheitel's allegedly false testimony is placed by Interstate in a completely different context from that in which it was in fact given; the reference is changed from Queen City stock to depositary receipts. There is simply no justification or excuse whatsoever for Interstate deliberately attempting to distort the record in this manner.

Interstate has not offered any evidence to contradict the testimony of Mr. Love that he did not know who bought his depositary receipts or those of the Hardison family (A174), and Interstate made no effort to call as witnesses the employees of First Securities Corporation who handled the transaction, or Mr. Love's son, who had apparently made an earlier sale through an acquaintance at First Securities Corporation, or any of the four Hardisons. Inter-

state should not be permitted to repeat in this Court its reckless charge that this testimony was false.

The testimony of Mr. Moore now claimed by Interstate to be fraudulent (JS 29-30) follows a line of questions about whether Transcon had agreed to provide the funds to purchase depositary receipts or had set up a market for the depositary receipts. The answer "We have no part of it", which Interstate denominates as a denial that Transcon purchased the receipts, when read in context (A171-176) is a denial that Transcon had an agreement, commitment or part in the setting up of a market. It is most significant that Greyhound, whose attorney was then questioning Mr. Moore, did not understand this testimony as a denial of Transcon having purchased the depositary receipts.* There is no evidence that Mr. Moore's testimony was untrue. Indeed, it is fully corroborated by the clear evidence that there was no secret agreement or commitment on Transcon's part to purchase the depositary receipts.

Interstate's jurisdictional statement contains only a minute portion of the 1285 pages of testimony taken before the I.C.C. In this entire transcript no officer of Transcon was ever asked whether Transcon had ever bought any Queen depositary receipts or whether any subsidiary had bought any. Since Queen's existing officers and directors

* On July 9, 1965 on the basis of the disclosures that Transcon had acquired certain depositary receipts of Queen and Virginia, which appeared in the June 15, 1965 I.R.S. ruling (53a) Greyhound filed a complaint requesting an investigation (Docket No. MC-F-9165) to determine whether these acquisitions constituted an early acquisition of control in violation of Section 5(4) of the Interstate Commerce Act. Greyhound did not in that complaint, and has never, claimed that the testimony of Messrs. Moore, Scheitel and Love was false or misleading. Clearly Greyhound did not understand their testimony as Interstate now claims it should be read.

had remained in office, it was clear that there had been no transfer of control, and apparently no one considered such a question to be worth the asking.

C. *The Decision of the Commission Was Not the Result of the Allegedly False Testimony*

Interstate through Mr. Burt by mid-September of 1964 had advised the Bureau of Enforcement of the Commission of his belief that Transcon had purchased the depositary receipts for cash. (R. 55-2, Letter, Vice Chairman Webb to Burt, 18 Sept. 1964; R. 55-1, Letter, Merrill, Director of Bureau of Inquiry and Compliance to Burt, 18 Sept. 1964). Within a week after the hearings, the General Counsel of Transcon, Mr. Goff, furnished representatives of the Commission's Bureau of Enforcement, upon the latter's inquiry, with all records concerning Highway's purchase of depositary receipts. (R. 53-Reply of Transcon, 11/5/65, p. 5; Reply of Transcon, 12/27/65, p. 12; Reply of Transcon, 2/2/66, p. 35; Answer of Transcon, 8/9/65; Reply of Transcon, 1/24/66.) Thereafter, on at least nine separate occasions, Interstate charged in documents submitted to the Hearing Examiner or the Commission that Transcon had bought Queen depositary receipts for cash and that the Transcon witnesses had testified falsely to conceal these purchases.* The Commission took note of Interstate's charges of fraud (A52), expressly recognized Transcon's contention that there was no evidence that Transcon had any arrangement or agreement to purchase Queen depositary receipts (A56) and disposed of Interstate's secret agreement contention with the statement:

---

* R. 53-Petition 10/11/65, Petition 12/7/65, Letter 12/8/65, Exceptions 1/3/66, Petition 2/21/66, Motion 2/24/66, Reply Brief 2/28/66, Reply Brief 3/1/66, Petition 5/26/66.

> "Nor is the purchase of the depositary receipts a partial consummation of the transactions, which are based on an exchange of shares of Transcon stock per shares of stock of the carriers to be acquired." (A60)

Under these circumstances, there is simply no basis for Interstate's contention that the decision of the Commission was a product of the very "fraud" which had been repeatedly charged before the Commission reached its decision in the pending Commission proceeding.

Moreover, we submit that the Commission's rejection of the fraud charges is amply warranted by the evidence, circumstantial and testimonial, which is referred to at pp. 41 to 45. The sum and substance of the matter is that appellant's charges of fraud go to the veracity of Messrs. Love, Moore and Scheitel. Interstate had conceded this, for in its brief in the District Court it stated: "• • • • The veracity of the testimony of the Transcon witnesses is placed in issue [by the IRS Ruling, R. 53-Exh. 168]." It has long been settled that

> "The credibility of the witnesses and the weight of the evidence are for the Commission [ICC] and not for the courts, and its findings will not be reviewed here if supported by evidence." *Warehouse Co.* v. *United States,* 283 U.S. 501, 508 (1931).

See also: *N.L.R.B.* v. *Marcus Trucking Co.,* 286 F. 2d 583, 589 (2d Cir. 1961); *Federation of Union Representatives* v. *N.L.R.B.,* 339 F. 2d 1926, 129 (2d Cir. 1964); *William N. Feinstein & Co.* v. *United States,* 209 F. Supp. 613, 619 (S.D.N.Y. 1962) (single judge), *aff'd* 317 F. 2d 509 (2d Cir. 1963).

The correctness of the Commission's decision is also apparent from the flimsy and wholly unreliable character of the assertions upon which Interstate predicates its charge of fraud. Some examples of these irresponsible charges are:

(1) At page 34 of its Jurisdictional Statement, Interstate asserts that Transcon concealed its 100% ownership in the subsidiary which acquired the depositary receipts and that this 100% ownership was material to the I.R.S. tax ruling. The fact is that Transcon never at any time concealed its 100% ownership of its subsidiary. At the time Transcon was authorized to acquire 100% of the subsidiary, Transcon prepared a press release setting forth the facts. (R. 53—attached to motion of Interstate in Docket No. MC-C-4969, 3/9/66). This was followed by the publication in the Wall Street Journal on August 3, 1964 of an article describing the transaction and stating "Transcontinental said it will have acquired 100% of the capital stock of Western Sales [Transcon's subsidiary]." Moreover, as appears from the affidavit of tax counsel, the transitory 100% ownership of the subsidiary was not material to the I.R.S. tax ruling. (R. 64, ¶ 9, 63a, 64a).

(2) At page 32 of the Jurisdictional Statement, Interstate describes Jones, attorney for the Queen stockholders, as "embarrassed" upon learning in November of 1964 that Transcon had acquired depository receipts through its subsidiary. Interstate's choice of the word "embarrassed" is important because it is designed to show that the attorney for one of the participants in the "fraud" was concerned to discover what was going on. But the characterization "embarrassed" is simply made up out of whole cloth. There is absolutely nothing whatsoever in the record reference cited

by Interstate (R. 41-43) or anywhere else to support the assertion that Mr. Jones was "embarrassed."

(3) Interstate asserts that the Commission has conceded Scheitel's testimony to be false (JS 67 n. 2, 70). The Commission at no time has ever conceded that Scheitel's testimony was false. What the Commission's attorney said was that, if Scheitel's testimony can be read as a denial of knowledge of the purchases, it is false (JS 31). This is obviously not a concession that Scheitel in fact testified that he did not know who bought the depositary receipts.

(4) Interstate's charges of fraud are the product of piling one flimsy inference on another. Interstate begins by printing Scheitel's answer "I don't know who bought it" out of context. The answer is distorted by inserting "[depositary receipts]" after "some," and by deleting eight questions and answers without use of ellipsis dots in order to juxtapose a question about depositary receipts with an answer about Queen City stock. (JS 28). The answer is thus stamped as a reference to the depositary receipts and not Queen stock. Interstate then blandly, repeatedly and incorrectly avers that the I.C.C. has conceded Scheitel's testimony to be false. (JS 31, 67 n. 2, 70). This purported concession by the I.C.C. is then expanded to a further concession that the testimony of all three witnesses, Moore and Love as well as Scheitel, is false. (JS 67). There is simply nothing at all in the record on which to base the statement that the Commission conceded the testimony of Moore, Love and Scheitel to be false. Next, Interstate would transmute Scheitel's alleged false denial of knowledge of the purchase of depositary receipts into rendering false Moore's and Love's denial of any *commitment* to buy the depositary receipts.

(5) To all this misstatement and false innuendo must be added Interstate's totally false representations that (a) Transcon delayed disclosing the purchase of the deposit receipts to the I.R.S. until after settlement of the North Carolina suit (pp. 10, 11, *supra*) and (b) Interstate was induced to settle the North Carolina litigation by the testimony of Moore, Scheitel and Love (pp. 10, 11, 12, *supra*). and to these false representations must be added Interstate's distortion of Scheitel's testimony at p. 28 of the Jurisdictional Statement to make it appear that Scheitel was referring to depositary receipts instead of Queen stock.

CONCLUSION

Interstate Investors, Inc. is not a carrier. Interstate claims no interest in Virginia and Safeway—two of the carriers whose acquisition is challenged here. As to the third, Queen, Interstate in 1965 sold and released its claim for $25,425. The Three Judge District Court below properly held that if Interstate wishes to resuscitate its interest in Queen, it must do so in an appropriate proceeding in the Western District of North Carolina, where the settlement was approved and the order dismissing Interstate's claim with prejudice was entered. Interstate is without any interest in Transcon's acquisition of Queen, Safeway and Virginia and thus has no standing in Federal court to bring an action to challenge the I.C.C. orders which authorized those acquisitions.

The I.C.C. orders are supported by substantial evidence in the record, and disclose that the I.C.C. correctly applied the appropriate standards in appraising the public interest in ruling on Transcon's applications.

The District Court correctly held that the I.C.C. orders were not the product of fraud.

Therefore, intervenor-defendant-appellee Transcon respectfully requests that the appeal of Interstate Investors, Inc. be dismissed on the ground that plaintiff-appellant lacks the requisite standing to prosecute this appeal, or alternatively, that the Court summarily affirm the order of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

Respectfully submitted,

THOMAS F. DALY
Attorney for Intervenor-Defendant-Appellee
25 Broadway
New York, N. Y. 10004

Of Counsel:

JOHN W. CASTLES, 3d
WARREN A. GOFF
WENDELL DAVIS, JR.
LORD, DAY & LORD

APPENDIX

Letter from Hunter Jones to W. M. Nicholson and J. B. Ledford dated January 26, 1965

(Appendix No. 44 to Plaintiff-Appellant's Memorandum Re Equitable Relief in District Court)

(Letterhead of Jones, Hewson & Woolard, Charlotte, N. C. 28202)

January 26, 1965

Mr. W. M. Nicholson
Mr. James B. Ledford
Attorneys at Law
Charlotte, N. C.

Re: Interstate Investors, Inc. vs. L. A. Love, et al
Interstate Investors, Inc. vs. Queen City Coach Company, et al

Dear Sirs:

The five individual defendants in the case of Interstate Investors, Inc. vs. L. A. Love, et al have agreed that they will participate in a settlement of these two cases to the extent of $12,500.00 on the basis of a total payment of $25,000.00, provided the proposed participation by Queen City Coach Company and General Realty and Insurance Corporation to the extent of the other $12,500.00 involved in such a settlement is approved by the directors of said companies. A regular directors' meeting is scheduled to be held on January 28th and the matter could be submitted to them at that time provided we have the plaintiff's agreement to accept $25,000.00. In view of the interest of the individual defendants in making the settlement, we have advised that this vote would have to be by a majority of the directors who are not defendants, but the settlement,

if agreed to by you, will be recommended and we believe it would be approved. We would need your agreement to it before we could have it submitted to the directors.

The settlement, if made, would be based upon the following further considerations:

1. Each party would bear its own court costs.

2. All the defendants in both cases would be released from all claims of every nature of the plaintiff Interstate Investors, Inc. and of William R. Burt individually.

3. Interstate Investors, Inc. and William R. Burt would withdraw all opposition to approval of the exchange of stock for stock of Transcontinental Bus System, Inc. pending before the ICC.

4. The plaintiff Interstate Investors, Inc. and William R. Burt would execute a general release in favor of Transcontinental Bus System, Inc., if requested, covering all claims.

Mr. Hewson, Mr. Smith and I will be out of town for the balance of this week after Wednesday, but if you can give us assurance that this proposal will be accepted by the plaintiff before we leave, or can give it to John Ray before the meeting of the directors on Thursday, it can be submitted to the directors and if they approve it we can prepare the settlement papers on our return next week.

Yours very truly,

HUNTER M. JONES

HMJ:H

cc: Mr. Smith
Mr. Ray
Mr. Love

Letter from W. M. Nicholson to Plaintiff-Appellant dated January 28, 1965

(Correspondence, Docket MC-F-8744)

(Letterhead of Wm. M. Nicholson,
Charlotte, N. C. 28204)

January 28, 1965

Mr. William R. Burt, President
Interstate Investors, Inc.
733 Third Avenue
New York 17, New York

Dear Bill:

As per your request during our telephone conversation on yesterday, I am forwarding you the various depositions, letters and other documents that you requested. As a matter of necessity, I had to break these down into five separate packages.

Package No. 1, which is marked in the left hand corner on the face of the package, contains the deposition of Mr. Egan. Package No. 2 contains Hunter Jones' letter of January 26, which is the offer of settlement. Also, a letter from Mr. Jones under date of January 27, 1965, which confirms the settlement plus $425 which is estimated as our cost and which we will have to pay out for depositions and copies. There is also enclosed the affidavit of Addison H. Reese, corrections to deposition of William R. Burt, deposition of Joel W. Wright and deposition of Leslie A. Heath.

Package No. 3 contains the deposition of L. A. Love, Sr. Package No. 4 contains part of the deposition of William R. Burt from Page 1 to Page 165 and in the second volume from Page 166 to Page 290. Package No. 5 contains a continuation of the deposition of William R. Burt from

Page 291 to Page 520. I trust these papers will reach you in good shape. As you know, the offer of settlement was contingent upon a resolution of the Board of Directors of Queen City Coach Company approving aand ordering a payment of its pro rata part.

Hunter Jones left town yesterday afternoon and requested that I call John Ray at 3:00 p.m. today and ascertain if the Board of Directors had acted favorably upon this proposition; I called John Ray a few minutes ago and he was out of the office, and I left word for him to call me. While dictating this letter, the call came in and John Ray advised me that the Board of Directors had acted favorably upon the resolution and now it is a deal and no backing out.

Unless you hear further from me, I strongly suggest that you make your arrangements to be in Charlotte Thursday morning, February 4 in order for us to sign papers, receive the draft and close this matter out.

With kind personal regards,

Sincerely,

W. M. NICHOLSON

WMN:sn
cc: Mr. James B. Ledford

P. S. When you come down next Thursday, be sure and bring a certified copy of a resolution from your Board of Directors authorizing the acceptance of this offer and further authorizing you to act for and on behalf of the corporation in signing such necessary papers in closing this deal. I also suggest that you bring along your corporate seal. With this authority from the corporation and acceptance on its behalf, I see no hitch in closing this matter out Thursday.

W. M. N.

January 29, 1965 Resolution of Board of Directors of Plaintiff-Appellant

(Ex. 3 to Affidavit of W. R. Burt of March 14, 1967 Upon Standing Motion)

CERTIFICATE OF RESOLUTION

The undersigned duly certifies that at a properly held meeting of the board of directors of Interstate Investors, Inc., 733 Third Avenue, New York, New York on January 29, 1965 at which a quorum was present the following resolutions were properly and formally adopted:

RESOLVED, that the President be and hereby is authorized to settle Civil Action #1914 USDC, Western District of North Carolina versus L. A. Love, Sr. et al, and Civil Action #1935 USDC, Western District of North Carolina versus Queen City Coach Co. and General Realty & Insurance Corp. by accepting payment on behalf of the defendants of $25,000 plus $425 for expenses, and it was further

RESOLVED, that William R. Burt, President of the corporation, be and hereby is authorized to execute on behalf of the corporation all documents necessary to consummate the settlement.

/s/ MIRIAM A. CAHNERS
Miriam A. Cahners, Secretary

Corporate Seal

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

On this 2nd day of February 1965, before me personally came Miriam A. Cahners to me known, who, being by me duly sworn, did depose and say that she resides at 200 East 57th Street, New York, New York that she is Secretary of Interstate Investors, Inc., the corporation described in and which executed the foregoing instrument; that she knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that she signed her name thereto by like order.

ARNOLD C. STREAM.
Notary Public, State of New York
No. 31-3874125
Certified in New York County
Commission Expires March 30, 1965

Letter from Hunter Jones to Nicholson and Ledford dated February 1, 1965

(Correspondence, Ex Parte MC-65 (Sub. No. 3))

(Letterhead of Jones, Hewson & Woolard,
Charlotte, N. C. 28202)

February 1, 1965

Mr. W. M. Nicholson and
Mr. James B. Ledford
Attorneys at Law
Charlotte, N. C.

RE: Interstate Investors, Inc. vs. Love, et al
Interstate Investors, Inc. vs. Queen City
Coach Company, et al

Dear Sirs:

I am delivering to Mr. Ledford's office a release to be executed by Interstate Investors, Inc. and William R. Burt and approved by the directors of Interstate Investors, Inc. so that you can forward this to Mr. Burt and have the execution completed before he leaves for Charlotte. We want eight of the releases executed so that each defendant can have an executed copy and Transcontinental Bus System, Inc. can have the eighth one. Please be sure to have the corporate seal of Interstate Investors, Inc. attached to each executed copy of the release.

I hope to receive from Mr. Goff today the papers which he will want signed in connection with the proceedings before the Interstate Commerce Commission. I will turn them over to you as soon as they are received, and it may

be that these also will have to go to New York for signatures other than that of Mr. Burt.

I enclose original and two copies of judgment in each case which we propose. Inasmuch as the release authorizes you to consent to these judgments as attorneys, we did not deem it necessary to have them signed by an officer of the plaintiff. However, if you prefer that they be signed on behalf of Interstate Investors, Inc. by Mr. Burt as president, I suggest that you provide for the additional signature on the space to the right of your signatures.

Yours very truly,

/s/ HUNTER M. JONES

HMJ:H
Encl.

Letter from J. B. Ledford to Plaintiff-Appellant dated February 2, 1965

(Enclosure #1 to plaintiff's supplemental memorandum in District Court re motion filed November 25, 1966)

(Letterhead of James B. Ledford, Charlotte, N. C. 28202)

February 2, 1965

Mr. William R. Burt, President
Interstate Investors, Inc.
733 Third Avenue
New York 17, New York

Dear Bill:

'Enclosed are copies of release to be executed by you, attested by the secretary of III and with the corporate seal affixed, together with a copy of a judgment that the Defendants want entered upon the conclusion of this matter and a copy of Mr. Jones' letter dated as shown. Since talking with you and Mr. Nicholson by telephone this morning, you will note that the releases have been amended so that the signatures of directors are not required, but Mr. Jones does want a certified copy of the resolution of the directors pertaining to this transaction that you referred to this morning.'

Mr. Jones informed me that the letter from Goff should arrive some time today, and that, inasmuch as an attorney in Washington filed a brief for the ICC on behalf of ICC, that his signature is desired on that instrument. I will forward it to you upon receipt of it.

Mr. Nicholson will be out of town the rest of this day and all day tomorrow, and before he left, suggested that if all documents can be completed that we would hope that you could be in Charlotte on Friday, February 5, for concluding the transaction at hand. Since he is out of town I will undertake to get the documents of Goff in the mail to you either late today or tomorrow. With warm regards, I remain,

Very truly yours,

/s/ JIM
James B. Ledford

JBL:en

Enclosures

cc: Mr. W. M. Nicholson

Letter from Plaintiff-Appellant to I.C.C. (Acting Secretary) dated February 2, 1965

(Ex. CCC to Plaintiff's Reply to Intervenor's Motion to Dismiss in District Court)

February 2, 1965

Mrs. Bertha P. Armes
Acting Secretary
Interstate Commerce Commission
Washington 25, D.C.

Re: *Ex Parte MC-65 (Sub-No. 3)*

Dear Mrs. Armes:

Receipt is acknowledged of Mr. McCoy's letter of December 17, 1964, and petitioner acquiesces in the modification of the original petition as indicated in the letter and the notice published in the Federal Register on December 2, 1964.

In view of such acquiescence, petitioner has not seen fit to disseminate additional copies of the original petition, in the belief that the contents of the notice in the Federal Register have superseded the original text of November 5, 1964 and that interested parties should concentrate their attention on the subject matter as revised and published by the Commission.

The representations on behalf of the Motor Carriers Lawyers Association dated January 29, 1965 seems to confirm the danger that persons insisting on acquiring and reading the original petition can become confused as to what the

proper subject matter now is after the modification of the petition as reflected in the notice published in the Federal Register.

I enclose a copy of a letter from the Chairman of the Senate Subcommittee on Antitrust and Monopoly dated November 25, 1964 which confirms that procedures and problems raised by subject petition (monopoly, duopoly, over-concentration in transportation) are of concern and interest to the legislative branch of the Government.

It is requested that this letter and its enclosure be shown to Chairman Webb for such consideration and further dissemination in the Commission as he may deem appropriate.

It was the accident of being a participant in a bus control hearing that caused the writer of this letter to realize that, if he had not been present, a most unreliable basis for producing the raw evidentiary material upon which to base a finding on the record by the Commission in the public interest in accordance with the legal requirements analyzed and set forth in the "Report of the Attorney Generals' National Committee to Study the Antitrust Laws" dated March 31, 1955, Chapter VI, Regulated Industries at p. 270 re Mergers.

It certainly should not sit well with the Senate Subcommittee on Antitrust and Monopoly to find on investigation that the Attorney General has not lifted a finger to head off duopoly in the intercity, scheduled bus industry and that the Commission has absolutely no procedure set up for developing evidence in the record (other than what the duopolists would choose to introduce) of what action is in the public interest upon which to exercise and to base its expert judgment.

Incredible as it may seem, the applicant and proponent of duopoly in Docket No. MC-F-8744 has even cited in its brief the absence of the Department of Justice from participation in the proceedings as evidence that the Department condones the establishing of duopoly (See brief of Transcontinental Bus System, p. 112).

Queen City's management and Transcontinental (which has under its contract with Queen to approve any disbursements not in the ordinary course of business) are conditioning their willingness to settle the private breach of contract action pending in the Federal Courts on Petitioners withdrawal of its opposition of record to the Transcontinental acquisitions. This is precisely the reason I gave to the Antitrust Division as to why it rather than petitioner should carry the burden of developing the public interest and monopoly aspects of the proposed Transcontinental mergers before the Commission.

The issue of settlement in the Federal Court breach of contract proceedings has been precipitated by defendants motion for summary judgment and the Courts desire to rule thereon promptly. Consequently petitioner is under pressure from Queen City to accept a substantial monetary settlement proposed by defendants or risk the expenses inherent in appeal if the summary judgement opinion is adverse to plaintiff. The problem of pressure for voluntary settlement, let alone the involuntary effect resulting from a motion for summary judgement, was reviewed with Mr. Pearce of the Antitrust Division as a reason for not placing the burden on private parties to carry forward public interest aspects in the ICC hearings and was specifically referred to in the first full paragraph on page 6 of

my letter of September 21, 1964 to then Vice Chairman Webb.

By copy of this letter to the Attorney General, I am suggesting that his Department assume the position of (or replace or substitute for) and responsibility for pursuing to completion the arguments put forward by petitioner in the Docket No. MC-F-8744 proceedings and in support of subject petition. The Department could be a late intervenor in the merger dockets and rely on the record and material produced by Interstate to support its position.

I am enclosing copies of Interstate's brief in this letter to the Attorney General and to Senator Hart so that they may have full details before them of the public interest aspects developed in the hearings by Interstate which, it is believed, should be preserved for consideration, even though Transcontinental and Queen may maneuver in the private litigation successfully to force Interstate's withdrawal from the ICC proceedings.

Only in this way or by affirmative action of the Commission can the public interest be adequately represented despite the coercive pressure on petitioner and imminence of court action in the private litigation in North Carolina.

Very truly yours,

WILLIAM R. BURT
President

WRB:l
encl.

ccs: Attorney General Katzenbach
Senator Philip Hart, Chairman
Senate Subcommittee on Antitrust and Monopoly

Letter from William R. Burt to The Hon. J. Braxton Craven, Jr. dated February 4, 1965

(Appendix F to Intervenor's Reply to Plaintiff-Appellant's Petition in Ex Parte MC-65 [Sub. No. 3])

WILLIAM R. BURT
ATTORNEY AT LAW
733 THIRD AVENUE
NEW YORK 17, N. Y.
MURRAY HILL 2-3277

February 4, 1965

The Hon. J. Braxton Craven, Jr.
Chief Judge
Federal Courthouse
Charlotte, North Carolina

Re: Civil Actions No. 1914 and No. 1935
Interstate v. Love et al and Queen City

Dear Judge Craven:

Inasmuch as we appeared as counsel for Interstate at the deposition of International Utilities, Inc. by William F. Egan in New York City on December 3, 1964, certain action was taken by counsel for the defendants and the reporter it selected in Civil Action No. 1914 and No. 1935 in regard to such deposition that we believe seriously prejudiced our client.

Inasmuch as the settlement that has been worked out has been negotiated by local counsel for the parties under your friendly prodding, we are setting forth the facts of what

occurred in New York directly before you so that you can consider their weight and advise whether the matters so raised in your opinion are of sufficient weight to warrant submission by the plaintiff of a motion for a continuance under Rule 56(f) with all that that involves. * * *

* * * You alone can appreciate how much you have done via your control of timing and informally expressed views of the merits of the litigation, based on the record that was before you for evaluation coupled with the court's power to grant or deny motions, to cause settlement within a certain monetary range. If what was before you at the time you expressed your views was the work product of fair opportunity to the plaintiff to develop the record, there is no question but that plaintiff would be chargeable with adherence to any settlement that was worked out under your guidance and power to grant the motion for summary judgement or, alternately, nonsuit.

On the other hand, if you consider the procedure deficiencies in the proceedings outlined above have been of substantial detriment to plaintiff's cause because you were mousetrapped into expressing your views on the merits prior to fair opportunity having been accorded plaintiff to permit it to develop an adequate factual record upon which you could base your evaluation, then we believe plaintiff should be encouraged to submit a motion for a continuance under Rule 56(f) with a corresponding postponement of the trial date.

Counsel for defendants has indicated that you were instrumental in defendants setting the limits of their settlement offer and you, of course, know the pressure that has been exerted on Mr. Nicholson by the possibility that the boom would be lowered within a matter of hours on plaintiff in

the form of entry of the granting of the motions for summary judgement by defendants unless settlement was reached.

So that you may be aware of the massiveness of the effort, which included resolution of many matters in the public interest, that may abort because of the views that you have expressed on the merits of the pending litigation, based on the reasons outlined above on what we believe was deficient record before you, we enclose several documents which outline the scope of the actions hinging for their continuance upon whether plaintiff is granted an adequate day in your court, or what is believed to be an inadequate one resulting from the procedural deficiencies outlined above • • •

• • • This material is submitted informally in the interest of expediting preliminary consideration and deposition of it by the Court.

As matters now stand, the cases are enroute to settlement, and this letter merely raises problem for reconsideration as to whether the plaintiff had a fair day in court on the basis of which the settlement was evolved.

Very truly yours,

William R. Burt

WRB:1
enclosures

Letter from William R. Burt to James Ledford dated February 8, 1965

(Enclosure #2 to Plaintiff's Supplemental Memorandum in District Court re Motion Filed November 25, 1966)

February 8, 1965

James Ledford, Esq.
500 Law Building
Charlotte, North Carolina

Dear Jim:

We have gone over the material forwarded with your letters dated February 2 and February 5 and wish to make the following comments within the framework of the settlement letters from counsel for defendants in Civil Actions 1914 and 1935 dated January 26 and January 27, 1965.

1) Paragraph 2 of Mr. Jones's letter provides for release of defendants in both cases, and it is believed that one document or set of documents should be drawn up to achieve this as stated without extending to include "all of its officers and directors" for Queen and General Realty.

2) Paragraph 3 states "would withdraw all opposition to approval of the exchange of stock."

a) This withdrawal can only, in our opinion, be pursuant to filing the settlement documents and advising the Commission that the withdrawal is based solely on such settlement, and

b) Ex Parte MC-65 (Sub No. 3) is a petition for rule making and as published in the Federal Register at p.

16105 for December 2, 1964, which text as published has been acquiesced in by Interstate and supersedes the original petition, relates to all transportation under jurisdiction of ICC. It is not an opposition proceeding and does not fall within the scope of "withdraw all opposition." In view of the fact that Interstate will have withdrawn from the MC-F-8744 proceedings, Ex Parte MC-65 cannot have any "opposition" status.

3) Paragraph 4 provides for a release for Transcontinental Bus Systems, Inc. and should be covered by a separate general release document apart from the documents covering the defendants and, of course, the Transcontinental document should not encompass "all of its officers and directors" because such a requirement was not included in Mr. Jones's letter of January 26.

4) You have advised me that Mr. Jones has agreed that from each person Interstate and/or Burt are required to issue a general release, Interstate and Burt will receive a general release in exchange.

5) We were somewhat shocked to discover that the draft of "Request of Interstate Investors, Inc." to be dismissed as a protestant in the above captioned dockets (MC-F-8744 and MC-F-8774) as drawn by counsel for Transcontinental and the defendants provided that Interstate "has now reconsidered its position." Interstate has not reconsidered anything and, solely as a condition required by defendants in Civil Actions 1914 and 1935 USDC-W.D. No. Car. in their settlement proposal, has given consideration to any withdrawal. To misstate the facts as proposed by defendants and Transcontinental would, in our opinion, constitute a conscious misstatement to the Commission.

If documents can be drawn up reflecting the above and sent here promptly, we shall process them here immediately upon receipt with our counsel, Paskus, Gordon and Hyman, in advance of my departure for Charlotte.

Sincerely yours,

William R. Burt

WRB/l

ccs: Messrs. Goff
Jones
Nicholson

Request of Plaintiff-Appellant To Be Dismissed as Protestant in Dockets MC-F-8744 and 8774 and Finance Dockets 23123 and 23159 dated February 16, 1965

(Appendix J to Intervenor-Defendant-Appellee's Reply to Plaintiff-Appellant's Petition in Ex Parte MC-65 [Sub No. 3])

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. MC-F-8744

TRANSCONTINENTAL BUS SYSTEM, INC.

—CONTROL—

VIRGINIA STAGE LINES, INCORPORATED, *et al.*

Finance Docket No. 23123

TRANSCONTINENTAL BUS SYSTEM, INC.

—STOCK—

Docket No. MC-F-8744

TRANSCONTINENTAL BUS SYSTEM, INC.

—CONTROL—

QUEEN CITY COACH COMPANY, *et al.*

Finance Docket No. 23159

TRANSCONTINENTAL BUS SYSTEM, INC.
—STOCK—

REQUEST OF INTERSTATE INVESTORS, INC., TO BE DISMISSED AS A PROTESTANT IN THE ABOVE CAPTIONED DOCKETS

Now comes Interstate Investors, Inc., and for cause would show to the Commission as follows:

I.

On September 9, 1964, Interstate Investors, Inc., by and through its attorneys of record sought leave to intervene in the above captioned matters as a Protestant. Said leave was granted and it participated in the hearings held September 9, 10, 11, 14 and 15 and October 26, 27, 28, and 29, 1964, at the offices of the Interstate Commerce Commission in Washington, D. C. It also filed a Brief in these Dockets dated January 25, 1965.

II.

Interstate Investors, Inc. now desires to withdraw from these matters as an intervenor and to withdraw its protest. Interstate requests that it be allowed to so withdraw and that the Commission issue an Order dismissing it from further participation in these Dockets.

Respectfully submitted,

WILLIAM R. BURT,
733 Third Avenue,
New York 17, New York,
Attorney for Interstate Investors, Inc.

GUY MARTIN,
MARTIN S. THALER,
MARTIN, WHITFIELD AND THALER,
1701 Pennsylvania Avenue,
N.W.,
Washington, D. C. 20006,
Of Counsel.

CERTIFICATE OF SERVICE

I, WILLIAM R. BURT, do hereby certify that on this 16th day of February, 1965, I have caused a copy of the foregoing property addressed with sufficient postage attached to be placed in the United States mail to all parties of record.

William R. Burt

Transcript of Proceedings—February 18, 1965, United States District Court for the Western District of North Carolina

(Appendix G to Intervenor-Defendant-Appellee's Reply to Plaintiff-Appellant's Petition in Ex Parte MC-65 [Sub No. 3])

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

Civil #1914

INTERSTATE INVESTORS, INC.,

Plaintiff,

—v.—

L. A. LOVE, SR., JOEL W. WRIGHT, W. E. SMITH, HERMAN H. HARDISON, JR., and JAMES A. HARDISON, JR.,

Defendants.

—and—

Civil #1935

INTERSTATE INVESTORS, INC.,

Plaintiff,

—v.—

QUEEN CITY COACH COMPANY, a corporation, and GENERAL REALTY AND INSURANCE CORPORATION, a corporation,

Defendants.

Transcript of proceedings February 18, 1965

APPEARANCES:

Plaintiff —W. M. NICHOLSON, Esq.
Attorney at Law
Charlottetown Office Bldg.
Charlotte, North Carolina

JAMES B. LEDFORD, Esq.
Attorney at Law
Law Building
Charlotte, North Carolina

Defendants—HUNTER M. JONES, Esq.
Attorney at Law
Law Building
Charlotte, North Carolina

HARRY C. HEWSON, Esq.
Attorney at Law
Law Building
Charlotte, North Carolina

This cause came on for hearing on February 18, 1965, at Charlotte, North Carolina, before the Honorable J. Braxton Craven, Jr., Judge, sitting without a jury, and the following proceedings were had, to wit:

Court: I called this hearing so that I might be released from my obligation to withhold filing the ruling on the motions for summary judgment which I did feel obligated to withhold because I agreed to do so with Mr. Nicholson and Mr. Jones asking me to withhold filing of that ruling. So I now simply inquire of you, do you want me to withhold it further or shall I file it?

Mr. Nicholson: May I make a statement, Your Honor?

Court: Yes, sir.

Mr. Nicholson: Your Honor, I am pleased to state to the Court that a voluntary settlement satisfactory to our client has been entered into and the papers have been signed.

Court: I am pleased, too. In view, however, of Mr. Burt's letter to me I want to inquire of him if this is one that is indeed satisfactory and I don't want him to settle this case if he feels in the slightest coerced by this Court because such a settlement is a terrible thing.

Mr. Nicholson: He has expressed to me his satisfaction of the settlement.

Mr. Burt: Yes, sir, I'm pleased with the settlement that has been worked out.

Court: All right. Well, do we all agree that it has been settled?

Mr. Jones: Yes, sir, with the understanding that Your Honor will now be willing to sign a consent judgment, consented to by the plaintiff and defendant, dismissing the two actions with prejudice because we're going to pay the money on releases which have been executed.

Court: Do you want to know how I ruled on the motions for summary judgment?

Mr. Nicholson: No, sir.

Court: I'll be glad to reveal it.

Mr. Jones: Well, it's all right with us either way.

Court: Would it affect the settlement? Do you agree that it would not affect the settlement?

Mr. Jones: It won't from our standpoint.

Court: I'll instruct the Clerk—she's has it it in her locked box, and she can open it up and put it in the file. Anybody who wants to read it can. Mr. Burt won. Motion for summary judgment was denied.

Whenever you've got the judgment ready, then, I'll be glad to sign it. Do you have it ready now?

Mr. Jones: It's in Mr. Ledford's office.

Mr. Ledford: We have a copy here.

Mr. Jones: He has a copy there but I can bring the original back tomorrow. I'll be over here on another matter, and we are to deliver the checks this afternoon.

Court: All right, fine. Well, I am pleased indeed. I claim to be the greatest compromiser since Henry Clay. Compromise to me is not a dirty word. It's a wonderful thing. If I may say this, when I first started to practice law the first case I ever had was with Mr. Strickland in Lenoir and, bless his heart, he never did try a case in court to win, he always tried it to appeal, always, all the way to the United States Supreme Court. This was my first lawsuit and I said, "Mr. Strickland, I don't know anything about the law, don't know anything about it, but shouldn't we consider compromise?" He said, "Oh, no, we're not going to consider compromise." And we didn't and we got Judge Sink and we lost. Not long after that I ran across Senator Ervin and told him about it and he said that all of life was a compromise, that if you had doughnuts for breakfast you had to leave off pie in the evening. I've adopted that philosophy ever since.

Gentlemen, thank you for coming to this hearing. We'll recess until tomorrow.

• • • • •

Certificate

I, Evelyn S. Berger, Official Court Reporter for the United States District Court for the Western District of North Carolina, do hereby certify the foregoing to be a true, complete and accurate transcript of the trial proceedings in the above entitled case as taken by me in Stenotypy and by recording machine.

This 3rd day of March, 1965.

/s/ Evelyn S. Berger
Official Court Reporter

General Releases to Queen City Coach Corp., et al. and to Transcontinental Bus System, Inc. dated February 18, 1965

(Exs. BB and DD to Complaint)

GENERAL RELEASE

IN CONSIDERATION of the payment of the sum of twenty-five thousand, four hundred and twenty-five dollars ($25,425.00), the receipt of which is hereby acknowledged, the undersigned, Interstate Investors, Inc., a Delaware corporation with its principal office at 733 Third Avenue, New York, N. Y., and William R. Burt, have released, and do hereby forever release and discharge L. A. Love, Sr., Joel W. Wright, W. E. Smith, H. H. Hardison, Jr. and James A. Hardison, Jr.; Queen City Coach Company, a North Carolina corporation, and General Realty and Insurance Corporation, a North Carolina corporation, from all claims and causes of action which they, Interstate Investors, Inc. and William R. Burt, or either of them, now have, or may hereafter have, growing out of all occurrences, conduct, correspondence, documents, contracts and negotiations taking place up to, and including, the date of this instrument, including, but not limited to:

(a) All claims in any way involved in Civil Action No. 1914 instituted in the United States District Court for the Western District of North Carolina entitled "Interstate Investors, Inc., plaintiff, versus L. A. Love, Sr., Joel W. Wright, W. E. Smith, Herman H. Hardison, Jr. and James A. Hardison, Jr., defendants".

(b) All claims in any way involved in Civil Action No. 1935 instituted in the United States District Court for the Western District of North Carolina entitled "Interstate Investors, Inc., plaintiff vs. Queen City Coach Company, a corporation, and General Realty and Insurance Corporation, a corporation, defendants".

(c) All claims and causes of action on contract or for breach of contract.

(d) All claims and causes of action in tort.

(e) All claims and causes of action arising under antitrust laws, and any other Federal or State statute or law, including claims for damages thereunder, and all claims and causes of action at common law relating to monopoly, unfair competition, interference with contract relations or negotiations, or injury to business.

(f) All other claims and causes of action for damages, expenses, injuries, costs and losses.

The undersigned further authorize the attorneys of record for Interstate Investors, Inc. in the two civil actions pending in the United States District Court for the Western District of North Carolina hereinabove recited to consent to judgments in said actions dismissing each of said actions with prejudice and providing that each party in each action shall pay its own costs.

The undersigned Interstate Investors, Inc. is withdrawing its opposition to approval by the Interstate Commerce Commission of the exchange of stock of Queen City Coach Company for stock of Transcontinental Bus System, Inc. by withdrawing as a protestant in Docket No. MC-F-8744 and other proceedings consolidated therewith and by

withdrawing its Ex Parte Petition known as Ex Parte MC-65 (Sub-No. 3). Interstate Investors, Inc. and William R. Burt agree that neither of them will, in the future, directly or indirectly do anything to hinder or delay favorable action by the Interstate Commerce Commission, or any member, agent or agency of said Commission, upon the pending application for approval of said exchange of stock of Queen City Coach Company for stock of Transcontinental Bus System, Inc.; and the undersigned recognize that this agreement precludes them from making any request or suggestion that any other person, corporation, governmental agency or governmental employee do anything to oppose, hinder or delay such approval.

IN TESTIMONY WHEREOF the said Interstate Investors, Inc. has caused this instrument to be signed by its President, and its corporate seal attached, all by corporate authority, and William R. Burt has hereunto set his hand and seal in his individual capacity, this 18 day of February, 1965.

INTERSTATE INVESTORS, INC.

By /s/ WM. R. BURT

President

/s/ WM. R. BURT

William R. Burt

(SEAL)

/s/ WM. MICHELSON

Witness as to all signatures

GENERAL RELEASE

WHEREAS, the undersigned Interstate Investors, Inc., a Delaware corporation, with its principal office at 733 Third Ave., New York, N. Y., and William R. Burt, as part of a settlement agreement between them and L. A. Love, Sr., Joel W. Wright, W. E. Smith, H. H. Hardison, Jr., James A. Hardison, Jr., Queen City Coach Company, a North Carolina corporation, and General Realty and Insurance Corporation, a North Carolina corporation, agreed to execute this release in favor of Transcontinental Bus System, Inc., a Delaware corporation.

NOW, THEREFORE, in consideration of the premises and as part of the consideration for the payment of the sum of twenty-five thousand, four hundred and twenty-five dollars ($25,425.00) to Interstate Investors, Inc., by L. A. Love, Sr., Joel W. Wright, W. E. Smith, H. H. Hardison, Jr., James A. Hardison, Jr., Queen City Coach Company and General Realty and Insurance Corporation, the undersigned Interstate Investors, Inc. and William R. Burt have released, and do hereby forever release and discharge Transcontinental Bus System, Inc., a Delaware corporation, with its principal office in Dallas, Texas, from all claims and causes of action which they, Interstate Investors, Inc. and William R. Burt, or either of them, now have, or may hereafter have, growing out of all occurrences, conduct, correspondence, documents, contracts and negotiations taking place up to, and including, the date of this instrument, including, but not limited to:

(a) All claims referred to in a letter dated June 12, 1964, written by William R. Burt to Mr. Eric Butler of International Utilities Corporation, and all claims growing out of any facts or alleged facts therein related.

(b) All claims and causes of action growing out of negotiations and efforts by Transcontinental Bus System, Inc., to acquire stock in Queen City Coach Company and General Realty and Insurance Corporation; or out of its acquisition of said stock.

(c) All claims and causes of action on contract or for breach of contract.

(d) All claims and causes of action in tort.

(e) All claims and causes of action arising under antitrust laws, and any other Federal or State statute or law, including claims for damages thereunder, and all claims or causes of action at common law relating to monopoly, unfair competition, interference with contract relations or negotiations, or injury to business.

(f) All claims and causes of action for damages, expenses, injuries, costs and losses.

IN TESTIMONY, WHEREOF the said Interstate Investors, Inc. has caused this instrument to be duly executed by its President and its corporate seal attached, all by corporate authority, and William R. Burt has hereunto set his hand and seal in his individual capacity, this 18th day of February, 1965.

INTERSTATE INVESTORS, INC.

By /s/ WM. R. BURT

.....

President

/s/ WM. R. BURT

.....

(CORPORATE SEAL)

(s) WM. NICHOLSON

.....

Witness as to all signatures

Request of Plaintiff-Appellant for Leave to Withdraw in Ex Parte MC-65 [Sub. No. 3] dated February 18, 1965

(Appendix K to Intervenor-Defendant-Appellee's Reply to Plaintiff-Appellant's Petition in Ex Parte MC-65 [Sub No. 3])

BEFORE THE

INTERSTATE COMMERCE COMMISSION

EX PARTE 65 (SUB. NO. 3)

PETITION OF INTERSTATE INVESTORS, INC., FOR INSTITUTION OF A RULEMAKING PROCEEDING

REQUEST OF INTERSTATE INVESTORS, INC. FOR LEAVE TO WITHDRAW PETITION

Now comes Interstate Investors, Inc., and for cause would show to the Commission as follows:

I.

On November 5, 1964, Interstate Investors, Inc., by and through its attorney of record filed a Petition for Institution of a Rulemaking Proceeding, which Petition was numbered Ex Parte 65 (Sub. No. 3). Said Petition was duly noticed in the Federal Register on December 2, 1964, and all interested parties invited to reply thereto within thirty days which time was later extended to February 1 and subsequently to February 11, 1965, by the Commission.

II.

Interstate Investors, Inc., now desires to withdraw said Petition and requests that it be allowed to do so and that the Commission enter an Order dismissing same.

Respectfully submitted,

/s/ WILLIAM R. BURT

William R. Burt
733 Third Avenue,
New York 17, New York,

Attorney for Interstate Investors, Inc.

CERTIFICATE OF SERVICE

I, WILLIAM R. BURT, do hereby certify that on this 18th day of February, 1965, I have caused a copy of the foregoing properly addressed with sufficient postage attached to be placed in the United States mail to all parties of record.

/s/ WILLIAM R. BURT

William R. Burt

Judgment Dismissing Civil Actions Nos. 1914, 1935 U.S.D.C., WD N. Car., dated February 19, 1965

(Exs. D & E to Affidavit of William R. Burt of March 14, 1967 Upon Standing Motion in District Court)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 1914

INTERSTATE INVESTORS, INC.,

Plaintiff,

—v.—

L. A. LOVE, SR., JOEL W. WRIGHT, W. E. SMITH, HERMAN H. HARDISON, JR., and JAMES A. HARDISON, JR.,

Defendants.

It appearing to the Court from statement of counsel for both parties and their consent hereto that all matters in controversy have been settled between the parties.

It is thereupon adjudged that this action, be, and it is, dismissed with prejudice, and that each party bear its own costs.

This the 19 day of February, 1965.

J. B. CRAVEN, JR.
United States District Judge

WE CONSENT:

/s/ WILLIAM M. NICHOLSON
William M. Nicholson

/s/ JAMES B. LEDFORD
James B. Ledford
Attorneys for Plaintiff

JONES, HEWSON & WOOLARD
By /s/ HUNTER M. JONES
Hunter M. Jones

/s/ H. C. HEWSON
H. C. Hewson
D. D. SMITH By H. M. JONES
D. D. Smith
Attorneys for Defendants

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 1935

INTERSTATE INVESTORS, INC.,

Plaintiff,

—v.—

QUEEN CITY COACH COMPANY, a corporation, and GENERAL REALTY AND INSURANCE CORPORATION, a corporation,

Defendants.

JUDGMENT

It appearing to the Court from statement of counsel for both parties and their consent hereto that all matters in controversy have been settled between the parties.

It is thereupon adjudged that this action be, and it is, dismissed with prejudice, and that each party bear its own costs.

This the 19 day of February, 1965.

J. B. CRAVEN, JR.
United States District Judge

WE CONSENT:

/s/ WILLIAM M. NICHOLSON
William M. Nicholson

/s/ JAMES B. LEDFORD
James B. Ledford
Attorneys for Plaintiff

JONES, HEWSON & WOOLARD
By HUNTER A. JONES

/s/ HUNTER M. JONES
Hunter M. Jones

/s/ H. C. HEWSON
H. C. Hewson

/s/ D. D. SMITH By H. M. JONES
D. D. Smith
Attorneys for Defendants

Letter from Plaintiff to I.C.C. (Acting Secretary) dated February 26, 1965

(Correspondence, Ex Parte MC-65 [Sub No. 3])

INTERSTATE INVESTORS, INC.
733 Third Avenue
New York 17, N. Y.

Murray Hill 2-3277

Cable Address
"Intevestor" New York

February 26, 1965

Mrs. Bertha F. Armes
Acting Secretary
Interstate Commerce Commission
Washington 25, D.C.

Re: *Ex Parte MC-65 (Sub No. 3)—Proposed Rulemaking Under Provisions of Rule 1.44—Motor Carrier Operations*

Dear Mrs. Armes:

Reference your acknowledgement letter of February 25, 1964, it was agreed with counsel for the defendants in Civil Actions 1914 and 1935 USDC, W. D. N. C. that counsel for Queen would not file the request to withdraw the petition in Ex Parte MC-65 (Sub No. 3) until satisfactory releases had been exchanged between the plaintiff and the defendant in said civil actions.

To date no cross release texts from the defendants and Transcontinental Bus System, Inc. have been submitted to our company for approval, let alone accepted.

Consequently it is requested that the request for withdrawal in subject proceedings and for withdrawal as an intervenor in Dkt MC-F-8744 et al. (if this has also been submitted by counsel for Queen City or Transcontinental) be held in abeyance until authorization for their processing in the Commission is authorized by subsequent letter from the undersigned to your office.

Your assistance in this matter is appreciate.

Very truly yours,

/s/ William R. Burt
William R. Burt
President

WRB:l
ccs: HJones, WMNicholson, JLedford

Letter from Hunter Jones to I.C.C. (Acting Secretary) dated March 4, 1965

(Correspondence, Ex Parte MC-65 [Sub No. 3])

JONES, HEWSON & WOOLARD
ATTORNEYS AT LAW
Rooms 823-827 Law Building
CHARLOTTE, N. C. 28202

HUNTER M. JONES
HARRY C. HEWSON
WILLIAM L. WOOLARD

TELEPHONE
333-8684
AREA CODE 704

March 4, 1965

Mrs. Bertha F. Armes
Acting Secretary
Interstate Commerce Commission
Washington 25, D. C.

Re: Ex Parte MC-65 (Sub No. 3) Proposed Rule-making under Provisions of Rule 1.44-Motor Carrier Operations

Dear Mrs. Armes:

I received copy of Mr. William R. Burt's letter of February 26, 1965 to you under the above caption. I was counsel for Queen City Coach Company and others, defendants in the two civil actions referred to by him, and Mr. W. M. Nicholson and James B. Ledford, attorneys of Charlotte, were attorneys for Interstate Investors, Inc., the plaintiff in said actions. The representation made to you in the

first paragraph of Mr. Burt's letter of February 26th, 1965 is not correct. There was no agreement not to file the Request to Withdraw the Petition in Ex Parte MC-56 (Sub No. 3), or the Withdrawal as Intervenor in Docket MC-F-8744 et al. until there was an exchange of releases as stated by Mr. Burt. On the contrary, these two Requests for Withdrawal signed by Mr. Burt, and on which he signed a Certificate of Service dated by him on February 18th, were delivered in my presence to Mr. John F. Ray with authority on behalf of Mr. Burt to mail the copies in compliance with his Certificates of Service and to file the originals with the Commission and this authority contained no conditions whatever. The releases which Mr. Burt and Interstate Investors, Inc. were to sign were signed at approximately the same time. The cross-releases which Mr. Burt refers to were to be furnished later. The text of the one to be signed by the defendants in the Civil Actions had already been agreed upon but one of the signers was in Florida. The release to be signed by Transcontinental had been prepared in Dallas, Texas, but had not been received in Charlotte, and Mr. Burt expressly agreed in the presence of his attorneys, Mr. Nicholson and Mr. Ledford, to accept that in whatever form it had been drawn. It arrived on the following day, February 19th, and was on that day delivered to Mr. Ledford, Attorney for Interstate Investors, Inc. The release signed by the defendants in the Civil Actions was delivered to Mr. Ledford on February 25th, containing the text previously agreed upon.

Yours very truly,

/s/ HUNTER M. JONES

HMJ:H
cc: Mr. Burt
Mr. Nicholson
Mr. Ledford

Letter from Plaintiff-Appellant to I.C.C. (Acting Secretary) dated March 10, 1965

(Correspondence, Ex Parte MC-65 [Sub No. 3])

INTERSTATE INVESTORS, INC.
733 THIRD AVENUE
NEW YORK 17, N. Y. MURRAY HILL 2-3277

CABLE ADDRESS
"INTEVESTOR"
NEW YORK

Mrs. Bertha F. Armes
Acting Secretary
Interstate Commerce Commission
Washington 25, D. C.

March 10, 1965

Re: Ex Parte MC-65 (Sub No. 3) Proposed Rule-making under Provisions of Rule 1.44-Motor Carrier Operations

Dear Mrs. Armes:

We have received a copy of the Jones, Hewson & Woolard letter to you of March 4, 1965. The writer has no standing in subject proceedings inasmuch as the firm is counsel for the defendants (Queen City Coach Co. et al.) in Civil Actions 1914 and 1935 in the USDC, W. Dist. of N. Car. The letter does serve to confirm the statement in our letter to you of Feb. 26, 1965 that the requests for withdrawal were signed by Interstate but filed by counsel for Queen City pursuant to an agreement whose terms are now in dispute.

We repeat our earlier request that action by the Commission on the withdrawal be held in abeyance.

Thank you for your attention to this matter.

Very truly yours,

William R. Burt
President

WRB/mc

Letter from W. M. Nicholson and James B. Ledford to Hunter Jones dated March 11, 1965

(Appendix L to Intervenor-Defendant-Appellee's Reply to Plaintiff-Appellant's Petition in Ex Parte MC-65 [Sub No. 3])

JAMES B. LEDFORD
ATTORNEY AT LAW
LAW BUILDING
CHARLOTTE, N. C. 20202
TELEPHONE 333-7705

March 11, 1965

Mr. Hunter M. Jones
Jones, Hewson & Woolard
Attorneys at Law
823-827 Law Building
Charlotte, North Carolina

RE: Interstate Investors, Inc.
Queen City Coach Company
Love, et al. Matters

Dear Mr. Jones:

Receipt is acknowledged of your letters of recent date together with copies of correspondence between you and Mr. William R. Burt, President of Interstate Investors, Inc., 733 Third Avenue, New York, New York, all of which relate to the settlement of cases #1914 and 1935, in the United States District Court for the Western District of North Carolina at Charlotte, North Carolina.

I have just talked to Mr. Burt over the telephone this morning from Mr Ledford's office and it appears that his contention is that Transcontinental was given a release which was not in accord with his understanding and that he desires unless this matter can be remedied, that the settlement be voided and the above cases returned to status quo.

We have carefully examined the contentions of Mr. Burt and are at loss to understand why he now raises the question as above set out when in accordance with our definite understanding and agreement all of the conditions of the settlement were agreed upon by all of the parties thereto. We definitely recall the conference in the hallway in the United States District Courthouse in Charlotte when we stated to you that the Plaintiff, through its President, had agreed to settle these cases on the terms set forth in the releases which you had prepared. All releases, including the releases from the Defendants, were read by Mr. Burt; who at first refused to sign the releases to be executed by him, and at our subsequent meeting in the hallway as aforesaid, he agreed to settle these cases and sign the releases which you had prepared. The execution of the releases were made in the District Attorney's office prior to the convening of Court at which time a full and complete understanding was had between the parties. We later appeared before the Court and upon inquiry from the Judge, Mr. Burt arose and stated to the Court, in substance, that he was pleased with the settlement. We then left the Courtroom and came to Mr. Ledford's office in the Law Building where Mr. Burt put the Seal of the Corporation (Interstate Investors, Inc.) upon each of the releases which were delivered to us for the purpose of turning them over to you. At this time Mr. Burt, upon the full execution of these papers, received from

Mr. Ledford the sum agreed upon in the settlement less attorney fees and costs incurred during the discovery proceeding and the check received by Mr. Burt was deposited and has been paid. We had no intimation at that time that there was any disagreement as to the contents of the several releases and we were under the direct impression then and now that these cases were settled on the terms agreed upon between the parties.

We both distinctly remember that you told Mr. Burt that the releases from Transcontinental was being prepared by Mr. Goff and should be in your hands for delivery within the next day or so and that Mr. Burt replied, in substance, that he was making no point of the release from Transcontinental and that same could be copied from a form book or the use of a Blumberg Form, if necessary.

Concerning the filing of papers prepared to be filed with the Interstate Commerce Commission, which had been executed by Mr. Burt, there was some suggestion that those papers be returned to offices in the Law Building and mailed simultaneously with the sealing of the releases by Mr. Burt and the delivery of settlement checks by you. Inasmuch as a number of copies had to be made of such documents, it is our distinct recollection that these copies were to be made by Mr. John F. Ray, it was then suggested and agreed by all parties and their counsel, that these documents be held by Mr. John F. Ray for the purpose of making copies to be sent to the Interstate Commerce Commission and that Mr. Ray have the responsibility and authority of forwarding the same to the Interstate Commerce Commission. This question was brought up over the fact that Mr. Burt signed a statement that such documents had been mailed and served and John Ray assumed the responsibility of com-

pleting such service for him. We have no recollection, and do not believe there was any suggestion, that any of said documents were to be held by any person for any period of time, or that their filing with the Interstate Commerce Commission was to be contingent upon the happening of any event.

In view of the above, we are of the definite opinion and conclusion that these cases were settled in every respect in the manner agreed upon and that the resolution of the Board of Directors of Interstate Investors, Inc., which was exhibited by Mr. Burt, gave unto him the necessary authority to execute the aforesaid papers for and on behalf of the Corporation in the manner provided.

Very truly yours,

/s/ W. M. NICHOLSON
W. M. Nicholson

/s/ JAMES B. LEDFORD
James B. Ledford

WMN/JBL: en

cc: Mr. William R. Burt
733 Third Avenue
New York, New York

Letter from Warren A. Goff to I.C.C. dated June 25, 1965 and Enclosed Tax Ruling

(Late Filed Exhibit 168)

CONTINENTAL TRAILWAYS
315 CONTINENTAL AVENUE
DALLAS, TEXAS 75207
RI 6-3211 AREA CODE 214

June 25, 1965

WARREN A. GOFF
General Counsel
(Illegible) STAFFORD
Commerce Counsel

CARL B. CALLAWAY
Vice President and
Chairman at Law
ALFRED CRAGER
Corporate Counsel

RECEIVED
JUN 28 1965
INTERSTATE INVESTORS, INC.

Mrs. Bertha F. Armes
Acting Secretary
Interstate Commerce Commission
Washington, D. C.

Re: Docket No. MC-F-8744
Transcontinental Bus System, Inc.
Control—Virginia Stage Lines, et al.
Docket No. MC-F-8774
Transcontinental Bus System, Inc.—
Control—Queen City Coach Company, et al.

Dear Mrs. Armes:

At Pages 1281 and 1282 of the Record in the above captioned matter, the hearing examiner in those cases granted permission to the applicant to file certain late filed exhibits. All of the late filed exhibits which were enumerated therein have been filed with the exception of a tax ruling with reference to Queen City Coach Company and General Realty Company which had not been previously filed because applicants were awaiting its receipt from the Internal Revenue Service.

The tax ruling in question has now been received and I am attaching herewith the original and one copy of a tax ruling f m the United States Treasury Department in connection with Queen City Coach Company and General Realty and Insurance Corporation. The filing of this exhibit should complete the submission of all late filed exhibits by applicant.

Copies of this document have been mailed to all parties of record by and through their attorneys.

Sincerely,

Original Signed
BY WARREN A. GOFF
Warren A. Goff
General Counsel

WAG:bc
cc/enc: See attached

Carbon copies with attachment to:

Mr. Theodore Hardeen
Virginia Stage Lines, Inc.
Box 951
Charlottesville, Virginia

Mr. Douglas Drysdale
Battle, Neal, Harris, Minor & Williams
Court Square Building
Charlottesville, Virginia

Mr. John F. Ray
Attorney at Law
417 West 5th Street
Charlotte 1, North Carolina

Mr. James E. Wilson
Wilson, Woods & Villalon
Suite 716
Perpetual Building
1111 "E" Street, N.W.
Washington, D. C.

Mr. G. Kibby Munson
1012—14th Street, N.W.
Washington, D. C.

Mr. Maxwell A. Howell
Corcoran, Foley, Youngman & Rowe
1511 K Street, N.W.
Washington, D. C.

Mr. Robert J. Bernard
The Greyhound Corporation
140 South Dearborn Street
Chicago, Illinois

Mr. Martin S. Thaler
1701 Pennsylvania Avenue
Washington, D. C.

Mr. Earle W. Putnam
5025 Wisconsin Avenue, N.W.
Washington, D. C.

Mr. William R. Burt, President
Interstate Investors
733 Third Avenue
New York 17, New York

COPY

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Washington, D.C. 20224

In Reply Refer to
T:R:R
FJF

June 15, 1965

Queen City Coach Co.
417 West Fifth Street
Charlotte, North Carolina

Gentlemen:

This is in reply to letters requesting a ruling with respect to the Federal income tax consequences of a proposed transaction. Information was received in letters dated September 4 and November 2, 1964, from Mr. Hunter M. Jones and February 4 and 18, 1965, from Mr. Douglas D. Drysdale. The relevant information submitted for consideration is as follows.

Transcontinental Bus System, Inc. (hereinafter called "Transcontinental") (Account number 75-0748603), a Delaware corporation, is a common carrier,—passengers, baggage and express by bus,—both in interstate and intrastate commerce. Its stock is owned by approximately 4,000 shareholders, and is sold over-the-counter in the major cities of the United States.

Queen City Coach Co. (hereinafter called "Queen") (account number 56-0369400), a North Carolina corporation, is a common carrier,—passengers, baggage and express by

bus,—both in interstate and intrastate commerce. It has 22,264 shares of no par value common stock outstanding.

General Realty and Insurance Corporation (hereinafter called "Realty") (account number 56-0466720), a North Carolina corporation, is engaged in the insurance and real estate business. It has 7,992 shares of $25 par value common stock outstanding.

It is stated that the controlling interests of Queen and Realty are owned by the same persons. Their top management is essentially the same and except for one person their Boards of Directors are identical.

In order to effectuate substantial cost savings it was proposed that Transcontinental and Queen be amalgamated. Because of the close relationship between Queen and Realty, Transcontinental considered it essential to acquire the stock of Realty in the event it acquired Queen.

All of the shares of Queen and Realty will be deposited with a bank in exchange for transferable "depositary receipts" by the shareholders of Queen and Realty. On consummation of the proposed transaction, Transcontinental will deliver its shares to the depositary in exchange for the Queen and Realty shares, and the depositary will then distribute the Transcontinental shares to the then holders of the depositary receipts.

Transcontinental will exchange 7.25 shares of its common stock for each share of Queen common stock and 7.25 shares of its common stock for each share of Realty common stock. A shareholder entitled to receive a fractional share of Transcontinental stock will receive scrip, which, when combined with other scrip, entitling the holder to a full share of stock, may be exchanged for stock in Trans-

continental. The depositary will act as the agent for the holders of scrip to sell such scrip for cash on account of the holder.

Each shareholder will pay the depositary for his share of any transfer fees and attorney's fees and Transcontinental will pay the other expenses of the depositary.

Transcontinental does not own stock (or depositary receipts representing stock) of Queen or Realty. However, Highway Insurance Company, of Zurich, Switzerland, a wholly-owned subsidiary of Western Sales, Limited, a Bahamian corporation, 49 percent of the stock of which is owned by Transcontinental, has purchased depositary receipts representing 1,387 shares of Queen and 829 shares of Realty.

It is stated that the holders of not less than 50 percent of the stock of Queen and the holders of not less than 50 percent of the stock of Realty have no present intention of disposing of the stock of Transcontinental which they will receive upon consummation of the proposed exchanges.

It is stated that there is no commitment, formal or informal, by Transcontinental or any one acting on its behalf to purchase Transcontinental stock from any of the shareholders of Queen or Realty after consummation of the proposed exchange, or to purchase depositary receipts before that time.

During the 12-month period preceding the filing of the applieation for a ruling 495 shares of Queen and 66 shares of Realty changed hands. Most of the Transfers were by way of gift, and all were within family groups.

It is assumed that Transcontinental has no present intention to liquidate Queen or Realty.

Based solely upon the information submitted and the assumption stated above, it is held as follows:

(1) The acquisition by Transcontinental, solely in exchange for shares of its voting stock, of shares of Queen and Realty, pursuant to the plan, will constitute a reorganization, in each instance, within the meaning of section 368(a)(1)(B) of the Internal Revenue Code. Transcontinental, Queen and Realty will be considered parties to the reorganization within the meaning of section 368(b) of the Code.

(2) No gain or loss will be recognized to the shareholders of Queen and Realty upon the exchange by them of their stock in Queen and Realty for stock of Transcontinental (including script certificates received in lieu of fractional shares) as provided in section 354 (a)(1).

(3) The basis of the Transcontinental stock received by the holders of Queen and Realty stock (including script certificates received in lieu of fractional shares) will be the same as the basis of the Queen and Realty stock surrendered in exchange therefor, pursuant to section 358(a).

(4) Gain or loss will be recognized to the shareholders of Queen and Realty who sell their script certificates, measured by the difference between the basis of the stock of Queen and Realty properly allocable to the script certificates sold and the proceeds of the sale Provided such script certificates represent capital assets in the hands of the shareholder, gain or loss will constitute capital gain or loss subject to the provisions and limitations of Subchapter P of Chapter 1 of the Code.

No opinion is expressed as to the tax treatment of the transaction under the provisions of any of the other sections of the Code and Regulations which may also be applicable thereto or to the tax treatment of any conditions existing at the time of, or effects resulting from, the transaction which are not specifically covered by the above rulings.

It is important that a copy of this letter be attached to the Federal income tax returns of the interested parties for the taxable year in which the transactions are consummated.

Pursuant to your power of attorney on file in this office, a copy of this letter has been sent to Mr. Hunter M. Jones and to Mr. Douglas D. Drysdale.

Very truly yours,

/s/ JOHN W. S. TITTLETON
Director, Tax Rulings Division

Affidavit of Douglas D. Drysdale Sworn to on May 24, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERSTATE INVESTORS, INC.,

Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

—and—

TRANSCONTINENTAL BUS SYSTEM, INC.,

Intervenor-Defendant.

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, *ss.*:

DOUGLAS D. DRYSDALE, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the bars of the State of Virginia and the District of Columbia. My firm is Caplin & Drysdale, 1101 17th Street, N.W., Washington, D. C. The senior member of this firm is Mortimer M. Caplin, with whom I was in partnership in Charlottesville, Virginia, prior to his appointment as Commissioner of Internal Revenue. Since my graduation from

law school in 1953, I have been continuously engaged in the practice of law and have devoted the majority of my time to the federal tax area. My firm specializes in federal tax matters and handles a substantial volume of applications for Internal Revenue Service rulings, particularly in the reorganization area. I am a lecturer at the University of Virginia Law School, presenting a seminar for advanced students in the federal tax field. I have lectured on federal tax matters before a number of professional institutes, such as the Tax Institutes of Tulane University and the University of Miami. I have also contributed to the Journal of Taxation and am the editor of Michie's Federal Tax Handbook, published annually by The Michie Company of Charlottesville, Virginia.

2. In the latter part of 1963 and early part of 1964, as attorney for the stockholders of Virginia Stage Lines, Inc. (hereinafter "Virginia"), I participated in negotiations with Transcontinental Bus System, Inc. (hereinafter "Transcon"), which resulted in a contract executed on March 26, 1964, pursuant to which Transcon was to acquire substantially all of the stock of Virginia solely in exchange for Transcon voting stock, subject to approval of the I.C.C. and the issuance of a satisfactory tax ruling. In connection with these negotiations I learned that Transcon had investments in various European operations. I learned also that Transcon planned to divest itself of some part of its foreign holdings, and the agreed upon exchange ratio of Virginia stock for Transcon stock was arrived at on the basis that Transcon would own only 40% of the foreign subsidiaries at the time of consummation. The contract between Transcon and the Virginia shareholders contained a warranty that Transcon's assets, at the time

of consummation, would include 40% of the foreign subsidiaries. In accordance with the understanding of the parties, Transcon's ownership of its foreign subsidiaries was 40% on September 16, 1966, the date on which the Virginia acquisition was consummated. Incident to my representation of the Virginia shareholders in this transaction, I applied for and obtained the necessary ruling from the Internal Revenue Service.

3. In May, 1964, Transcon entered into another contract for the acquisition of the stock of Queen City Coach Company (hereinafter "Queen") and General Realty & Insurance Corporation. The terms of this contract were substantially similar to those of the Virginia contract including specifically a condition that a satisfactory I.R.S. ruling be obtained and a warranty that at consummation Transcon would own 40% of its foreign subsidiaries. At the request of one of the officers of Virginia, I sent a copy of the request for tax ruling filed in the Virginia case to Mr. Hunter M. Jones of Charlotte, North Carolina, counsel for the Queen group, who I was told was not a specialist in tax matters.

4. In early August, 1964, I received a Transcon news release stating that Transcon was distributing as a dividend to its stockholders shares representing 51% ownership of Western Sales, Ltd. (hereinafter "Western"), the holding company for Transcon's foreign operations. More specifically, the release indicated that Transcon would (a) by purchase increase its ownership to 100% of Western, (b) recapitalize Western so that there would be two classes of stock outstanding, Class A and Class B, and (c) distribute Class A shares constituting 51% ownership of Western. The release stated that the plan had been adopted

by the Board of Directors of Transcon on July 31, 1964, and that distribution would be made on or about September 18, 1964, to Transcon stockholders of record on August 28, 1964. I considered this action on the part of Transcon as consistent with its agreement with the Virginia shareholders and anticipated that, at a subsequent date, additional Western stock would be distributed to reduce Transcon's ownership in that company to only 40%. Transcon made such a distribution, representing a 9% interest in Western, on June 3, 1966, to stockholders of record on April 1, 1966.

5. At the end of November, 1964, I was asked if I would assist Mr. Hunter M. Jones in obtaining the Internal Revenue Service ruling required in connection with the Queen acquisition, and agreed to do so. On Mr. Jones' getting in touch with me, I found that he had already filed an application for ruling with the Internal Revenue Service and had received a request for certain additional information from Mr. Frederic J. Freed, the technician handling the case in the Reorganization and Dividend Branch of the Tax Rulings Division of the national office, Internal Revenue Service. Shortly after my original contact with Mr. Jones I left the country for a vacation and was unable to work on the matter until I returned. About the middle of January, 1965, I went to see Mr. Freed in order to obtain some clarification of the questions he had raised with Mr. Jones, and under date of February 4, 1965, I furnished him with the information he had requested, together with some analysis of the applicable law.

6. One of the questions Mr. Freed asked was whether Transcon had acquired any of the depositary receipts issued

in connection with the Queen contract. My letter of February 4, 1965, stated that certain of the receipts had been purchased by Highway Insurance Company (hereinafter "Highway"), a Swiss corporation owned by Western, a 49% subsidiary of Transcon. Attached to the letter was a schedule showing the purchase dates, the numbers of shares, and the sellers. I did not advise Mr. Freed of Transcon's acquisition and distribution of Western stock during August and September, 1964, because I did not consider these facts material in the circumstances, as explained below.

7. The Queen application to the Internal Revenue Service asked for a ruling that the proposed exchange of Queen stock for Transcon stock would be a tax-free reorganization as defined in section 368(a)(1)(B) of the Internal Revenue Code. Under this provision, a tax-free reorganization occurs where one corporation acquires at least 80% of the stock of another corporation solely in exchange for voting stock of the acquiring corporation. Thus, if the acquiring corporation, in related transactions, acquires some shares of the stock of the other corporation for cash and other shares for stock, the requirements of a "B" reorganization are not met, because the acquiring corporation has given some consideration other than voting stock. On the other hand, if the acquiring corporation purchases for cash some stock in the corporation to be acquired, but disposes of that stock and later acquires 80% control of the acquired corporation solely for voting stock, there would, in my opinion, be a good "B" reorganization. In such a case all of the stock acquired by the acquiring corporation would be acquired solely in ex-

change for its own voting stock, and the prior cash purchase would not be relevant to the determination.

8. In the case of the Transcon acquisition of Queen, the question for ruling was whether at consummation Transcon would acquire all of the Queen shares for voting stock or whether the depositary receipts previously purchased by Highway for cash would be treated as if they had been purchased by Transcon. Since, as indicated above, the question whether Transcon gave consideration other than voting stock would have to be determined at the date of consummation, Transcon's record ownership of 100% of the shares of Western for a brief period in 1964 was not relevant in determining whether the purchases by Highway would be treated, at consummation, as the purchases of Transcon. Rather, the relevant question was whether the 49% ownership (which was expected to be reduced to 40% at the time of consummation) would be satisfactory to the Internal Revenue Service. In addition, I did not consider that Transcon would be viewed, for purposes of the reorganization provisions, as ever having owned 100% of Western. Prior to its acquisition of the Western stock it bought in August, 1964, it had declared a dividend payable in Western stock. The beneficial ownership of such stock was thus in Transcon's shareholders when Transcon acquired it and Transcon functioned as a mere conduit by which certain stock was transferred to its shareholders.

9. When I first learned of the purchases of the depositary receipts by Highway, I recognized that there was a possibility that the Revenue Service would consider these to be purchases by Transcon; although, in my view, they were not. While there are many Internal Revenue Code provisions under which stock owned by one party is treated

as being owned by another related party, none of them was applicable to the case under consideration. It was also my view that if the Revenue Service did raise a question about the Highway purchases, the problem could be solved simply by having Highway dispose of the depositary receipts before the closing. I reasoned that if this were done, all of the Queen stock would be acquired by Transcon solely for Transcon voting stock, and any possible Service objection on this score would be removed. I so advised Mr. Warren Goff, general counsel for Transcon, in discussing the matter with him on the telephone. It did not prove necessary, however, for Highway to dispose of the depositary receipts since the Revenue Service did not consider the purchase of depositary receipts by Highway to be attributable to Transcon and issued a favorable ruling on the transaction.

10. The views expressed in paragraphs 7, 8 and 9 above are concurred in by two of my partners, each of whom held an important position in the office of the Tax Legislative Counsel, Treasury Department, which plays an important role in the drafting of tax legislation and Treasury Regulations.

11. At the time of my conferences and communications with Mr. Freed, I was unaware of precisely how the sales of the depositary receipts to Highway had been accomplished. While I assumed that Transcon had arranged for the purchases, I did not regard the manner in which they had been accomplished as having any bearing on the ruling applied for.

12. The opinions expressed above deal with a problem that is not encountered in all types of tax-free reorgani-

zations. For example, Transcon might have purchased 20% or more of Queen's stock (but less than 50%) for cash, and then amalgamated with Queen in a statutory merger. This would have been a tax-free reorganization as to those Queen shareholders who participated in the merger and received Transcon stock for their Queen stock.

13. I have read a copy of a letter from Mr. Frederic J. Freed to Mr. William R. Burt, dated May 10, 1967. In this letter Mr. Freed states: "If only one share of Transcon stock or only one depositary receipt was acquired while Western was a wholly owned subsidiary, it is my opinion that this would destroy the 'B' Reorganization." I have also read the letter of Mr. Burt dated April 5, 1967, to which Mr. Freed's letter was a reply. I note that Mr. Burt did not inform Mr. Freed of the transitory nature of Transcon's ownership of the Western stock which it distributed to its shareholders or of the fact that the equitable and beneficial ownership of that stock was in the Transcon shareholders at the time it was acquired by Transcon. In any event I do not agree with Mr. Freed's opinion on this point. He is not now, of course, speaking for the Internal Revenue Service; nor did he himself, when he was an employee of the Internal Revenue Service, speak for the Service. He was a technician in the Reorganization and Dividend Branch of the Tax Rulings Division of the Service. As such, he was not a Service official with authority to determine whether the ruling requested should be issued or denied. His function was to analyze the facts of requests for rulings which were assigned to him, obtain such additional information as he or his supervisor deemed necessary, prepare a draft ruling letter, and forward the file to his supervisor for review. Following review by his

supervisor, and the making of any changes required by the supervisor (which might involve reversal of the technician's holding) the file would, in normal course, be sent to the Branch Chief or Assistant Branch Chief for final review and signature. In some cases applications for ruling are submitted to further processing, and I believe that in the case of the Queen City ruling there was further review at the Division level, as indicated by the fact that the ruling was signed by Mr. John W. S. Littleton, Director of the Tax Rulings Division.

/s/ Douglas D. Drysdale

[Sworn to on May 24, 1967]

Article Appearing in Wall Street Journal

3 August 1964, p. 13

TRANSCONTINENTAL BUS SLATES DIVIDEND IN SHARES OF WESTERN SALES, LTD.

By a WALL STREET JOURNAL *Staff Reporter*

DALLAS — Transcontinental Bus System, Inc., declared a stock dividend payable in Class A shares of Western Sales, Ltd., a Bahamian corporation.

Transcontinental said the dividend will be distributed about Sept. 18 to stockholders of record Aug. 28 on the basis of one 11-shillings unit of the Western Sales Class A shares for each two shares of Transcontinental stock held. The dividend will be distributed in the form of American depositary receipts representing Western Sales Class A stock. Cash will be paid in lieu of fractions on the basis of a market value per unit of stock of $2.50, Transcontinental said, noting that while the units of stock represent 11 Bahamian shillings this is the equivalent of the par value and isn't related to the market value.

The 993,286 units of stock to be distributed represent 51% of the combined total Class A and Class B units of stock to be outstanding upon a reclassification and conversion of shares of Western Sales currently in process, Transcontinental said. Prior to the distribution of the Class A stock, Transcontinental said it will have acquired 100% of the capital stock of Western Sales.

The dividend payment will leave Transcontinental with 174,914 units of Western Sales Class A stock and all the 778,800 units of Class B stock. After the distribution of the dividend, a stockholders' meeting of Western Sales will be called to accept the resignation of existing directors and to elect their successors, Transcontinental said.

Letter, Interstate's Secretary to Hunter Jones, 4/9/65

April 9, 1965

Mr. Hunter M. Jones
Jones, Hewson & Woolard
Attorneys at Law
823-827 Law Building
Charlotte, North Carolina

Re: Civil Actions 1914 and 1935—USDC, WDNC

Dear Mr. Jones:

Per the reasons set forth in Mr. Burt's letter to you of March 1, 1964, there are returned to you again the originals of:

a) "General Release" dated 18 February 1965 executed by the defendants in Civil Actions 1914 and 1925, and

b) "Release" dated 17 February 1965 executed by Transcontinental Bus System, Inc.

They arrived in this office for the second time as enclosures to the copy of the Nicholson-Ledford letter to you of March 11, 1965 sent to Mr. Burt.

In view of the position adverse to the interests of this company taken by Messrs. Nicholson and Ledford in their letter to you dated March 11, 1965, it is assumed they either have or intend to withdraw as counsel for this company in matters relating to dispute as to the settlement of Civil Actions 1914 and 1935.

The directors of Interstate have declined to ratify the inclusion of a release to Transcontinental Bus System, Inc. and its officers and directors covering their liability to this company arising out of violations of the antitrust laws as

part of the settlement of subject actions. Our position is that the authority to settle subject actions granted to the President of this company by resolutions of its Board on January 29, 1965, did not extend to such release of liability for Transcontinental which was not a party to subject actions.

We are advised that Mr. Burt delivered to you pursuant to your demand, a certified copy of the resolutions of January 29, 1965, referred to above, which served to notify you of the limits of the authority granted.

We are now advised that the terms of the releases in favor of the defendants in subject actions and Transcontinental Bus System, Inc., drafted by you and submitted for signature of the President of this company in the District Attorney's office in the Federal Court House, in Charlotte, N. C., at approximately 4:30 p.m. on February 18, 1965, contain terms making such releases void as against public policy and that the documents and the actions they include which you required be signed constitute violations of the laws of the United States of America, particularly the antitrust laws.

You are hereby notified that the releases executed by the President of this company on February 18, 1965 in favor of the defendants in Civil Actions 1914 and 1935, and Transcontinental Bus System, Inc., under the circumstances and for the reasons described above, are void.

Very truly yours,

Miriam Cahners
Secretary

ccs: Transcontinental Bus System, Inc.
Queen City Coach Company

INDEX

	Page
Statement	1
Argument	5
Conclusion	12

CITATIONS

Cases:

Control of Central Pacific by Southern Pacific, 76 I.C.C. 508	8
Control of D. S. & S. R.R. by Lehigh Valley R.R., 86 I.C.C. 567	8
Denver & Rio Grande W. R. Co. v. *United States*, 387 U.S. 485	8
Florida East Coast Ry. Co. v. *United States*, 259 F. Supp. 993, affirmed *per curiam*, 386 U.S. 544	8
McLean Trucking Co. v. *United States*, 321 U.S. 67	5
Minneapolis & St. L. R. Co. v. *United States*, 361 U.S. 173	5, 9
Penn-Central Merger Cases, 389 U.S. 486	5
United States v. *Southern Pacific Co.*, 290 Fed. 443	8

Statutes:

Clayton Act, Sections 7, 11	5, 7
Section 5, Interstate Commerce Act, 49 U.S.C. 5	2, 7, 8, 9, 12

329-933—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 755

INTERSTATE, INVESTORS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the judgment of a three-judge district court (J.S. A–1—A–39; 287 F. Supp. 374), unanimously sustaining a decision of the Interstate Commerce Commission that acquisition of stock control of three bus companies by Transcontinental Bus System, Inc. (Transcon), was consistent with the

public interest under Section 5 of the Interstate Commerce Act (49 U.S.C. 5). The three companies—Safeway Trails, Inc. (Safeway), Virginia Stage Lines, Inc. (Virginia) and Queen City Coach Company (Queen)—together with their subsidiaries, operate an Atlantic Coast route from Maine to Florida.

The competitive pattern in the industry is undisputed and was correctly set forth in the opinion below (J.S. A–2):

> The intercity nationwide bus industry is dominated by the Greyhound System. Transcon, though only one-fifth the size of Greyhound prior to the acquisitions under review, is its major competitor. Transcon also is a member of National Trailways Bus System (N.T.S.), a nonprofit association whose membership consists of a large number of intercity bus carriers, including the three acquired companies. To foster competition with Greyhound's nationwide operations, the N.T.S. members have adopted Trailways as a common trade name, use uniform paint schemes and markings on their busses, have joint terminals, some through bus arrangements and coordinate advertising, purchasing and other essential functions.
>
> The applications of Transcon to the I.C.C. for approval of the acquisition of Virginia, Safeway and Queen * * * were made to improve its competitive position in the southeastern United States where it had almost no operations. * * *

Appellant is a corporation claiming a prior oral contract to purchase Queen.[1] It makes no such claim as to Virginia or Safeway, but contends generally that the Commission's decision thwarted its efforts to enter the bus industry. The lower court "considered and determined" the merits in detail (J.S. A–6—A–36) but entertained "serious doubts" as to appellant's standing to raise its claims. It noted that appellant had no interest in Virginia or Safeway and was neither a competitor, shipper nor resident of the areas they serve. As to Queen, appellant's only interest was the former contractual claim that it had released with an agreement not to oppose the acquisition (J.S. A–36—A–38).

In the proceeding before the Commission Greyhound opposed the acquisitions, but it did not join in the instant litigation. The Amalgamated Transit Union stipulated that its members would not be adversely affected and obtained a three-year reservation of ICC jurisdiction for the purpose of employee protection. Approval of the acquisitions has been unopposed by any stockholder, passenger, shipper, or local community.

[1] Appellant instituted and, prior to the ICC examiner's report, settled an action for damages in the United States District Court for the Western District of North Carolina. Though appellant now contends that the releases it gave Queen were void, it has taken no action in that court and admittedly retains the $25,000 payment Queen gave it. J.S. A–37—A–38.

The Commission hearings filled nine days in September and October of 1964, and the hearing examiner's report recommending approval was issued in November of 1965 (J.S. A–77—A–133). After exceptions, replies, and numerous other pleadings, the full Commission granted the applications in a report issued in August of 1966 (J.S. A–40—A–76).[2] An ex parte restraining order was granted on September 18, 1966, but vacated on September 21, 1966. No relief was sought from the three-judge court, and the transactions were consummated shortly thereafter.

Much of the present dispute centers around Transcon's purchases, before it received Commission approval, of a minority interest (almost 10 percent) in Queen. During the hearings principal officers of Transcon and Queen gave testimony which can be read as denying such purchases. However, at the time of this testimony 6 percent of Queen's stock had been purchased by a subsidiary of a subsidiary of Transcon. These purchases continued after the close of the hearings until the subsidiary had acquired almost 10%. These matters were first disclosed when Transcon subsequently filed, as a late exhibit, an I.R.S. ruling as to the tax-free nature of the contemplated exchange between Transcon and Queen stockholders. (Item 53, Ex. 168).

[2] The record on appeal consists of some 72 separately numbered items, as listed on the Index to the Record on Appeal in this Court. Item 53, a certified copy of the record made before the Commission, contains the 1285 pages of transcript and 168 exhibits.

Appellant then filed with the Commission a complaint contending that these pre-approval acquisitions violated Sections 7 and 11 of the Clayton Act. This complaint was dismissed on the ground that it embraced facts and matters at issue in the concurrent proceedings under Section 5 of the Interstate Commerce Act. And in its decision in the Section 5 proceedings the Commission presumed that Transcon controlled the purchasing subsidiary. Thus the Commission attributed the early acquisitions to Transcon. It found, however, that the acquisitions did not amount to premature control of Queen or "partial consummation" (J.S. A–55, fn. 7; A–60). Accordingly, it found that approval of the transaction as a whole was consistent with the public interest.

ARGUMENT

Appellant's contentions were thoroughly considered in the extensive opinion of the unanimous court below. The decision is correct and should be affirmed.

1. The lower court's holding that "the Commission carefully explored the effect of the consolidations on the public interest and gave due weight to anti-trust considerations" is fully supported by the record (J.S. A–33). The Commission's analysis of competitive questions as a factor bearing upon the public interest was in accord with established principles and presents no question warranting plenary review. *E.g., McLean Trucking Co.* v. *United States,* 321 U.S. 67; *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173; *Penn-Central Merger Cases,* 389 U.S. 486.

Referring to the examiner's report, the Commission found that the consolidations "will not result in a reduction of competition, but will substantially increase competition" (J.S. A–64). The Trailways system—through its major member, Transcon—will be able to compete more effectively with Greyhound, the giant of the industry. As the district court pointed out (J.S. A–35, fn. 30):

> The record showed that in 1963 Greyhound earned 61% of the operating revenue of Class I Intercity Bus Carriers. Trailways earned 23%, which included the 11.27% earned by Transcon. Including the acquired companies would make Transcon's share 18%.

In particular on the Atlantic Coast, Transcon has had negligible operations and Trailways activities have been limited to such arrangements as could be reached with local independents. Transcon's control of the three companies will result in little loss of competition among the acquired lines because they operate essentially in end-to-end fashion with minimal duplication (J.S. A–34; A–64—A–65).

The Commission noted that the bus industry was different from other areas of the economy and had not developed a "three competitor" pattern (J.S. A–65—A–66). It further found that Greyhound and Trailways had satisfied public demands as to service, schedules, terminals, reliability, cleanliness, and safety, whereas "[M]any independent bus companies have not" (J.S. A–66). In short, the Commission reasoned:

> "Assuming *arguendo* that Greyhound and Trailways constitute a duopoly already, these applications portend nothing new for they involve primarily a strengthening of the Trailways system." [J.S. A–66 [3]]

Moreover, Transcon's control of the three companies would "result in better service to the public by the establishment of more through-service schedules replacing present cumbersome and inadequate pooling arrangements" (J.S. A–34). In addition, the public would receive new and better terminal facilities through central ownership and greater financial resources (J.S. A–34). Finally Transcon itself would achieve substantial savings (J.S. A–65). There was no showing of an adverse effect on competition and the Commission was plainly warranted in finding that these factors justified approval of the merger.

No different result is required because appellant filed a complaint contending that Transcon's early acquisition of almost 10% of Queen stock was violative of Sections 7 and 11 of the Clayton Act. The Commission properly dismissed the complaint, treating the question raised as a facet of the simultaneous Section 5 cases. (J.S. A–60). The lower court correctly held that:

> Whatever merit there might be to plaintiff's theory if a regulated carrier purchased stock

[3] As the lower court recognized (J.S. A–34, fn. 29), the Commission may certificate additional carriers should the public convenience and necessity warrant.

> in a competitor and took no further action, that is not what happened here. Transcon negotiated for the stock of the three carriers with a view toward obtaining control only if the Commission approved. [J.S. A–30; A–31.]

Here the early acquisitions were virtually concurrent with the Section 5 applications, in which competitive considerations were at issue.[4] It would have been futile for the Commission in one proceeding to direct divestiture of the 10%—assuming violation of the Clayton Act—while at the same time holding in another proceeding, as it did, that Transcon control of all of the stock was consistent with the public interest. Moreover, a separate Clayton Act proceeding was unnecessary since transactions may be approved under Section 5 even if otherwise violative of the antitrust laws.[5] Noting "the necessary interaction between the Clayton and Interstate Commerce Acts," the court properly sustained the dismissal of the Clayton Act complaint as "well within" the Commission's discretion under the

---

[4] In *Denver & Rio Grande W. R. Co.* v. *United States*, 387 U.S. 485, there was no concurrent Section 5 proceeding and hence no consideration of competitive questions whatsoever.

[5] A prior violation does not restrict the Commission's power of approval under Section 5. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 515–516, recognized in *United States* v. *Southern Pacific Co.*, 290 Fed. 443, 449–450 (D. Utah); *Control of D. S. & S. R.R. by Lehigh Valley R.R.*, 86 I.C.C. 567, 568. See also *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993, 1002, fn. 25 (M.D. Fla.), affirmed *per curiam*. 386 U.S. 544. Whether the early acquisitions are immunized is, of course, a question not involved in the instant case.

circumstances (J.S. A–32). As the court said "There is no requirement that an agency cover the same ground twice" (J.S. A–33).

Finally, there was no abuse of discretion in deciding against the "third force" hypothesis on this record. Appellant offered neither a concrete plan nor a rival application and the argument was properly described by the lower court as "speculative at best" (J.S. A–34). Compare *Minneapolis & St. L. R. Co.* v. *United States, supra.* Apart from the alleged oral contract with Queen stockholders there is no evidence as to any commitments or contracts of appellant or anyone else involving Virginia or Safeway. The record showed, as the lower court stated, that "many previous attempts to consolidate the southeastern Trailways carriers had failed, * * *" (J.S. A–35). In these circumstances, there was no requirement that the applications be denied with the hope that some one else might come along later.

2. The Commission did not abuse its discretion in approving the merger despite Transcon's concurrent acquisition, through its subsidiaries, of a small portion of Queen City stock.

Pending Commission approval of Transcon's Section 5 application, Queen stockholders delivered their stock certificates to a bank and received depository receipts in exchange. During the Commission hearings, and for a time thereafter, a Transcon subsidiary made a series of purchases of these receipts sufficient to create an interest in Queen of almost 10%. At the hearings three principal officers of

Transcon and Queen admitted that some Queen receipts had been traded but gave testimony which can be read as denying knowledge of the identity of the purchaser. The same witnesses also denied that Transcon had entered into a "commitment" or "secret agreement" to buy Queen receipts for cash—an agreement which appellant contends had been concealed to obtain a ruling from the Internal Revenue Service that the consolidation was a tax-free exchange of stock.

The purchases were disclosed to the Commission by Transcon in post-hearing papers in which the company claimed that it did not control the subsidiary which did the buying. The testimony as to the identity of the purchaser of the receipts was immaterial to the decision at bar, since the Commission presumed that Transcon was indeed the buyer (J.S. A–55, fn. 7). The subsequent discovery of the names of the Transcon employees who did the buying, including one of the witnesses who testified, made no difference and did not warrant further proceedings.[6] That there was a question of credibility concerning the purchases was apparent from the face of the record at the time the Commission decided the case. The witnesses had, arguably, denied purchases which were in fact made.

[6] Prior to filing our brief in the lower court we ascertained from Transcon's former general counsel—and disclosed to the court—that the purchases were made by Transcon employees, including counsel and one of the witnesses in question (J.S. A–164, 166). The testimony of this witness, as the lower court said, can be read as "plainly incredible" if it referred to the receipts (J.S. A–10, fn. 13). The testimony of the other two witnesses, as to identity of the purchaser of the receipts was, at the least, less than candid.

Appellant claimed perjury, an allegation noted by the agency in the decision under review (J.S. A–52). After weighing the evidence, the Commission imputed ownership of the 10% to Transcon, but concluded that these early acquisitions were not significant because Transcon had not thereby acquired unauthorized control of Queen, and because the purchases did not constitute "partial consummation" of the transaction (J.S. A–55, fn. 7; A–60).

In concluding that the purchases were not a "partial consummation," the Commission in effect rejected Investors' claim of an undisclosed agreement, and to this extent, accepted the denials by the witnesses before it. There was adequate other evidence justifying a finding of no agreement.[7] After an exhaustive review, the

[7] The receipts were bought by Transcon at prices apparently ranging from $241.25 to $290 per share, which seemingly bore no consistent relationship either to each other or to the then current price for Transcon stock. The selling Queen stockholders did not all use the same broker, and some employed a broker other than one suggested by Transcon. Appellant called no witnesses to substantiate the "agreement" theory though it had a source of inside information as to Queen affairs, had conducted extensive discovery in private Federal court litigation against Queen, and knew the identity of some of the selling stockholders and brokers (Item 53: Tr. 200, 815–816, 851–852, 865, 870; Exs. 97, 98, 105; Broker confirmations attached to Motion of Bruce Love to Amend Answer, filed March 29, 1966, in Docket MC–C–4969; letter of Burt to Butler dated June 12, 1964, filed as enclosure by appellant on Feb. 24, 1966, in Docket MC–C–4969; Exceptions of appellant, Ex. E. Item 41: Numbers 14–16, 18, 19, 32, 39, 59 (showing discovery) (J.S. A–167). As the lower court said, the purchase of some receipts "does not, by itself, establish the existence of such an agreement" (J.S. A–15).

lower court concluded that the Commission's determination was supported by the evidence (J.S. A–15). On the present record, therefore, no question warranting further review is presented here.[8]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN M. ZIMMERMAN,
Assistant Attorney General.
ROBERT E. EASTON,
HOWARD E. SHAPIRO,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission.

JANUARY 1969.

[8] Affirmance does not foreclose the Commission from reopening the proceedings should facts be developed at any time warranting such action, since Section 5(9) of the Act confers continuing jurisdiction to issue supplemental orders in merger proceedings, 49 U.S.C. 5(9).

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

INTERSTATE INVESTORS, INC. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 755. Decided January 27, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.